91-872

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether Fed. R. Evid. 804(b)(1) authorizes the admission against the government of the former testimony of a declarant who has been rendered unavailable by his assertion of his Fifth Amendment privilege, even though the government lacked any motive to cross-examine the declarant when the former testimony was given.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Matthew Ianniello, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward J. Halloran, Aniello Migliore, and Alvin O. Chattin were parties in the court of appeals.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 937 F.2d 797.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1991. A petition for rehearing was denied on September 24, 1991. App., *infra*, 53a-54a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Evidence 804(a)(1) provides:

Definition of unavailability. "Unavailability as a witness includes situations in which the declarant—

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement.

Federal Rule of Evidence 804(b)(1) provides:

Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

1. On April 7, 1987, a grand jury sitting in the United States District Court for the Southern District of New York returned a 35-count indictment against 11 defendants, including respondents Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, and Aniello Migliore. The indictment charged respondents with participating in the affairs of a racketeering enterprise known as the Genovese Organized Crime Family of La Cosa Nostra, and conspiring to do so, in violation of the Racketeer Influ-

enced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and (d). Among the 41 predicate acts alleged to constitute the pattern of racketeering activity were 16 charging fraud in the construction industry. Other predicate acts charged respondents and four other defendants with fraud against the International Brotherhood of Teamsters, illegal payoffs, the attempted extortion of an individual, extortion and fraud in the food industry, participation in illegal numbers and bookmaking businesses, and loansharking. App., *infra*, 6a-8a.

The trial began on April 6, 1987, and concluded 13 months later, on May 4, 1988. A large portion of the proceeding focused on the construction industry charges. The proof—based on extensive electronic surveillance and testimony by cooperating witnesses—showed that, between 1980 and 1985, respondents endeavored to rig the bids for concrete superstructure work on virtually every high-rise building in Manhattan that used more than $2 million worth of concrete. Through its control both over construction unions and the supply of ready-mix concrete, the Genovese Family, acting in concert with other La Cosa Nostra "families," created a "Club" of six concrete companies. In exchange for a payment of two percent of the contract price, the six companies were permitted to bid on large building jobs in Manhattan. The bids were rigged in accordance with an allocation of jobs by the Genovese Family and three other Mafia families. App., *infra*, 9a, 42a.

Prior to trial, pursuant to its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), the government informed respondents that Pasquale Bruno and Frederick DeMatteis had testified under immunity before the grand jury and might be sources

of exculpatory testimony. App., *infra*, 14a. The two—both principals in the Cedar Park Concrete Construction Corporation, which had allegedly been one of the companies in the "Club"—had denied participation in or awareness of the "Club" scheme. App., *infra*, 25a. Nonetheless, during trial, the government presented clear evidence that Cedar Park had participated in the Club scheme before the company went out of business. Two other Club contractors testified that they had been informed by members of organized crime families active in the scheme that Cedar Park was a member. Tr. 6526-6528, 6561-6568, 8176-8177, 8324-8326. That testimony was corroborated by intercepted conversations among the conspirators and a document seized from a Genovese Family location, which indicated that the Family had a ten percent interest in Cedar Park. GX 429; GX 4100, at 4-5. See App., *infra*, 43a-44a.

At trial, Bruno and DeMatteis appeared in response to defense subpoenas, but declined to testify, interposing their Fifth Amendment privilege. App., *infra*, 14a-15a. The government declined to immunize the two witnesses for purposes of trial, whereupon respondents asked that the witnesses' grand jury testimony be admitted under Fed. R. Evid. 804(b)(1), the hearsay exception for the prior testimony of unavailable witnesses (App., *infra*, 15a), or under Fed. R. Evid. 804(b)(5), the "catch-all" exception for statements of unavailable declarants. In response, the government submitted sealed affidavits, in which the government explained that it had "little or no incentive to conduct a thorough cross-examination of Grand Jury witnesses who appear to be falsifying their testimony to assist Grand Jury targets or other witnesses." App., *infra*, 19a.

The district court accepted the government's explanation and denied respondents' request to admit the testimony; the court held that, because the government had lacked the same motive to question the two witnesses in the grand jury as it would have had at trial, the earlier testimony was not admissible under Rule 804(b)(1). App., *infra*, 42a-52a. The court stated that the materials submitted by the government "seriously undercut the truthfulness of the grand jury testimony and explain why the prosecutor did not pursue the witnesses, by way of cross-examination, in the grand jury." App., *infra*, 51a. See n.4, *infra*. The court also ruled that, because the testimony lacked a "circumstantial guarantee of trustworthiness," it was not sufficiently reliable to be admitted under Rule 804(b)(5). Tr. 18319.

At the conclusion of trial, respondents were convicted on the RICO counts and the substantive charges arising out of the construction industry fraud. In addition, various defendants were convicted on counts charging labor payoffs, extortion and bid-rigging in the food industry, gambling, and loansharking.[1] Pursuant to the jury's verdict, the court then ordered the forfeiture of various defendants' interests in a number of assets, including large construction and concrete supply companies in New York City. App., *infra*, 9a-11a.

2. The court of appeals reversed all of respondents' convictions, holding that the district court had erred by refusing to admit the Bruno and DeMatteis grand jury transcripts at trial. App., *infra*, 24a. The

[1] Individual defendants were acquitted of mail fraud involving the national elections for the International Brotherhood of Teamsters, as well as the gambling and loansharking charges. App., *infra*, 38a-39a.

court concluded that the grand jury testimony of the two witnesses was "former testimony" under Fed. R. Evid. 801(b)(1), and that the witnesses—by virtue of their invocation of the Fifth Amendment privilege—were "unavailable" to respondents within the meaning of Fed. R. Evid. 804(a)(1). See App., *infra*, 24a. The court then addressed the remaining prerequisite for admission under Rule 801(b)(1)—that "the party against whom the testimony [was] offered" had a "similar motive to develop the testimony by direct, cross, or redirect examination." While agreeing "that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis," App., *infra*, 19a, the court held that "since these witnesses were available to the government at trial through a grant of immunity, the government's motive in examining the witnesses at the grand jury was irrelevant." App., *infra*, 21a; see also App., *infra*, 24a. The court concluded: "Since the witnesses were only unilaterally 'unavailable' and could have been subjected to cross-examination by the government [at trial], we will not countenance the exclusion of their grand jury testimony on the ground of purported fairness to the government." App., *infra*, 22a.

Having concluded that the district court erred in excluding the Bruno and DeMatteis grand jury testimony, the court of appeals ruled that, "[i]f this testimony had been believed, it is reasonably probable that the jury would have concluded either that no [concrete] 'club' existed, or at the very least that there was reasonable doubt as to its existence." App., *infra*, 25a. The court therefore held that the error required reversal of the "Construction Case convictions." *Ibid.* Because it regarded the remaining counts and predicate acts as " 'barnacles' on the ship

that was the Construction Case," the court reversed those convictions as well. *Ibid.*[2]

3. After denying the government's petition for rehearing and suggestion for rehearing en banc, the court of appeals on November 6, 1991, modified its opinion (App., *infra*, 40a-41a) by adding a single paragraph. The new portion of the opinion stated that the court had decided that "the testimony of Bruno and DeMatteis [was] available to the government but unavailable to the defendants." App., *infra*, 41a. The court added that it had "not considered in this case, because the issue [was] not before us, whether the government's power to grant immunity would affect a declarant's 'availability' under any of the other subdivisions of Rule 804(b)." App., *infra*, 41a.

4. On November 20, 1991, the court issued an order modifying its previous denial of rehearing en banc to note that Judges Newman, Kearse, Mahoney, and Walker dissented from that denial. App., *infra*, 55a-56a. In an opinion (App., *infra*, 57a-60a) filed the same day, Judge Newman, joined by the three other dissenting judges, argued that the court's "unprecedented" (App., *infra*, 57a) ruling in this case "departs without justification from the law of this

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[2] The court of appeals found that respondent Auletta should have been permitted to introduce the government's jury arguments in a related prosecution in which Auletta was not a defendant. See App., *infra*, 33a. The court, however, did not base its reversal of Auletta's conviction on that ruling. App., *infra*, 31a. The court also ruled that the limitations placed by the district court on cross-examination by defendant Ianniello deprived him of his right to present a defense and constituted reversible error. App., *infra*, 26a-30a. Ianniello was not named in the construction charges, and this petition does not address the court of appeals' decision as to him.

Circuit and creates a needless intercircuit conflict." App., *infra*, 60a. Judge Newman stated:

> Putting the Government to the unattractive choice of suffering the admission into evidence of uncross-examined hearsay that it believes is false or else obtaining the opportunity to cross-examine by conferring use immunity not only ignores the settled law in this Circuit and elsewhere on prior statements of witnesses who invoke the privilege against self-incrimination, but also undermines our consistent rulings refusing to impose on the Government an obligation to confer use immunity on defense witnesses.

App., *infra*, 58a-59a. Judge Newman further noted that, despite the panel's disclaimer that it was not deciding any issues arising under hearsay exceptions other than that created by Rule 804(b)(1), "the Government is entitled to be apprehensive that a ruling that a witness is 'available' to the prosecution because use immunity can be conferred might in the future be applied to determine 'availability' beyond Rule 804(b)(1)." App., *infra*, 60a.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case held that Rule 804(b)(1) authorizes the admission against the government of prior testimony by witnesses who are unavailable by virtue of their invocation of the Fifth Amendment privilege. The court of appeals adopted a sweeping rule that a district court must admit such prior testimony, regardless of the extent to which the testimony was accompanied by circumstantial guarantees of trustworthiness, the extent to which the government had any motive to cross-examine the declarant in the prior proceeding, and the extent to which a grant of immunity to the declarant would impede ongoing or planned criminal investigations or prosecutions.

The heart of the court's decision was its holding that the portion of Rule 804(b)(1) upon which the government had relied—the requirement that the party against whom prior testimony is offered must have had a "similar motive" to cross-examine the declarant at the time of the prior testimony—was "irrelevant." App., *infra*, 21a, 24a. The only explanation offered by the court for this holding was that the declarant in such a case is "available" to the government through a grant of immunity. That conclusion is wrong; even if correct, however, it would not justify the court's holding that an express requirement set forth in Rule 804(b)(1) is "irrelevant."

The court of appeals' decision conflicts with decisions of other courts of appeals, which have held that prior testimony by witnesses made "unavailable" by an assertion of privilege may not be admitted against the government absent a showing that the government had both the opportunity and the motive to cross-examine in the prior proceeding. The decision also disregards settled law disfavoring judicial interference in the government's immunity decisions. Especially in organized crime cases, the Second Circuit's holding may require the government, in order to avoid the introduction of unrebutted, perjurious grand jury testimony at trial, to confront the witness in the grand jury with evidence developed in the course of the investigation. To real such evidence at the grand jury stage, however, risks compromising the sources of that evidence and the integrity of the investigation. Because the correct resolution of the

question in this case is important to the criminal justice system, this Court's review is warranted.

1. Rule 804(b)(1) provides that former testimony from an unavailable witness is not excluded as hearsay if it meets a number of requirements: the declarant must have testified "as a witness at another hearing," and "the party against whom the testimony is * * * offered * * * [must have] had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). Former testimony that does not satisfy those requirements may of course be admissible under some other provision of the Federal Rules of Evidence, such as the residual exception to the hearsay rule for unavailable declarants, Fed. R. Evid. 804(b)(5).[3] Yet, if the proponent of the evidence seeks to introduce it under Rule 804(b)(1), the terms of that rule unambiguously provide no basis for admission unless the party against whom it is offered had an opportunity and similar motive to cross-examine the declarant in the prior proceeding.

The court of appeals disregarded the clear terms of Rule 804(b)(1) in ruling that the "similar motive" requirement is "irrelevant," App., *infra*, 21a,

[3] The case-by-case inquiry of Fed. R. Evid. 804(b)(5), which looks to a statement's "circumstantial guarantees of trustworthiness," is the approach courts have generally taken to the introduction of grand jury testimony. See *United States* v. *Fernandez*, 892 F.2d 976, 982-983 (11th Cir. 1989), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Snyder*, 872 F.2d 1351, 1355 (7th Cir. 1989); *United States* v. *Curro*, 847 F.2d 325, 327 (6th Cir.), cert. denied, 488 U.S. 843 (1988); *United States* v. *Marchini*, 797 F.2d 759, 762-764 (9th Cir. 1986), cert. denied, 479 U.S. 1085 (1987). Cf. *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990). The district court conducted just such an inquiry, and it found that Bruno and DeMatteis's testimony did not satisfy Rule 804(b)(5).

24a, whenever the government could make the declarant available by granting him immunity. That ruling has striking consequences. In this case, for example, the court of appeals did not overturn the district court's finding that the government's motive to cross-examine a witness testifying before a grand jury is "far different" from its motive to cross-examine a trial witness.[4] App., *infra*, 51a. Nor did the court of appeals find fault with the district court's finding, made in response to respondents' argument that the former testimony was admissible under Rule 804(b)(5), that the testimony lacked a "circumstantial guarantee of trustworthiness." See Tr. 18319. See also App., *infra*, 52a ("there is no adequate guarantee of reliability of the grand jury testimony to justify its placement before this jury"). Without suggesting that the district court even had

[4] The government's motive in examining a witness in the grand jury will rarely be "similar" to its motive at trial. The purpose of a grand jury investigation is to determine whether probable cause exists; a grand jury proceeding is "not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). When the government believes a witness has perjured himself in the grand jury, it has little incentive to discredit him on the spot with the vigorous cross-examination that would be appropriate at a trial. By simply excusing the witness and continuing the grand jury's investigation, the government retains the options of prosecuting the witness for perjury or obstruction of justice, or recalling the witness for further examination at a later time when the investigation produces more evidence with which to confront the witness. What is more, because the witness by his testimony has shown himself to be a likely ally of the investigation's targets, to confront him immediately with the evidence indicating his untruthfulness might imperil other witnesses and the ultimate success of the investigation by revealing facts about the probe's direction.

any discretion in ruling on the evidentiary issues under Rule 804(b)(1), the court of appeals held the prior testimony admissible.

The court of appeals attempted to justify its holding by suggesting that a distinction must be drawn between the declarant's unavailability to the proponent of hearsay testimony under Rule 804 and the declarant's unavailability to the opponent of that testimony. App., *infra*, 19a-22a. In this case, the declarants were unavailable to the proponents of the testimony because the declarants had invoked their Fifth Amendment privilege against compulsory self-incrimination. But, according to the court, the declarants were available to the government—the opponent of the testimony—because the government could render them available by granting them immunity.

We disagree with the court of appeals' conclusion that the declarants were available to the government for purposes of Rule 804.[5] But even if the declarants

[5] Rule 804(a)(1) defines "[u]navailability as a witness" to encompass cases in which a declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." Neither that definition nor any other provision of the Federal Rules of Evidence suggests that there is or ought to be any distinction between availability to the proponent of the hearsay evidence and availability to the opponent. Nor is there any basis for treating unavailability due to assertion of a Fifth Amendment privilege differently from unavailability due to other causes. As the court of appeals acknowledged, the Second Circuit itself has "long recognized that 'unavailability' includes within its scope those witnesses who are called to testify but refuse based on a valid assertion of their fifth amendment privilege against self-incrimination." App., *infra*, 16a. Other courts have similarly so held. See, *e.g.*, *United States* v. *Boyce*, 849 F.2d 833, 836 (3d Cir. 1988); *United States* v. *Silverstein*, 732 F.2d 1338 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Zurosky*, 614 F.2d 779, 792 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980); *Witham* v. *Mabry*, 596 F.2d 293 (8th Cir. 1979); see also Notes of Advisory Committee on 1972 Proposed Rules, 28 U.S.C. at 788 ("[s]ubstantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony)").

here could be said to be available to the government (notwithstanding the assertion of their Fifth Amendment privilege), the court's decision would still rest on a substantial misunderstanding of the structure of the rules governing hearsay. Under Rule 802, hearsay is "not admissible except as provided by [the Federal Rules of Evidence]." Rule 803 sets forth the general exceptions to the hearsay rule, and Rule 804 sets forth those exceptions that apply only if the declarant is unavailable as a witness. The only legal effect of a determination that a declarant is available is thus to eliminate the possibility that the hearsay statement could be admitted under Rule 804. There is no basis in the rules for the court of appeals' conclusion that a determination that the declarant is available to the opponent of the testimony justifies admission of the testimony without regard to the specific requirements of the exceptions enumerated in Rule 804(b).[6] Cf. *Bourjaily* v. *United States*, 483 U.S. 171, 178-179 (1987).

[6] The only authority cited by the court of appeals (App., *infra*, 21a) for the proposition that the "similar motive" requirement of Rule 804(b)(1) is "irrelevant" is a passage from a treatise on statutory construction discussing the "well established principle of statutory interpretation that the law favors rational and sensible construction." 2A N. Singer, *Sutherland Statutory Construction* § 45.12, at 54 (4th ed. 1984). We have no quarrel with that principle, although in our view the district court's construction of Rule 804(b)(1)

The logic of the court of appeals' decision would extend to other requirements of Rule 804(b)(1). For the court's reasoning strongly suggests that the "opportunity" prong of Rule 804(b)(1) is as vulnerable as the "motive" prong; if the declarant's "availability" to the government renders the government's motive to cross-examine the declarant in the prior proceeding "irrelevant," it is difficult to see why it would not also render "irrelevant" the government's opportunity to cross-examine him in the prior proceeding. See App., *infra*, 24a ("opportunity and similar motive to develop the testimony * * * is irrelevant"). Nor is there any reason why the government's status as a party in the prior proceeding—also a requirement of Rule 804(b)(1)[7]—should play a role in determining whether the prior testimony can be introduced in evidence by the defendant. In short, the carefully crafted requirements of Rule 804(b)(1)

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in accordance with its terms was eminently "sensible" and in no sense "irrational." In any event, "[j]udicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner* v. *Asphalt Products Co.*, 482 U.S. 117, 121 (1987) (per curiam); see also *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) (per curiam). As this Court remarked of Rule 52(a) of the Federal Rules of Criminal Procedure, Rule 804(b)(1) "is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988).

[7] See, *e.g.*, *United States* v. *North*, 910 F.2d 843, 906-907 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991); *United States* v. *McDonald*, 837 F.2d 1287, 1291-1293 (5th Cir. 1988); *United States* v. *Kapnison*, 743 F.2d 1450, 1458-1459 (10th Cir. 1984), cert. denied, 471 U.S. 1015 (1985).

simply evaporate under the court of appeals' ruling; despite its express terms, Rule 804(b)(1) becomes a license for admitting, at the defendant's behest, former testimony given in any proceeding by any witness who asserts his Fifth Amendment privilege in the course of a criminal trial.[8]

2. The Second Circuit's decision conflicts with those of at least four other circuits.[9] In *United States*

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[8] While the court of appeals expressly declined to base its ruling on *Brady* v. *Maryland*, 373 U.S. 83 (1963), it suggested that the government's refusal to acquiesce in the admission of Bruno and DeMatteis's grand jury transcripts might have violated its obligations under that line of cases. App., *infra*, 22a. That reading of *Brady* and its progeny is unwarranted and should pose no bar to review of the panel's evidentiary ruling. While *Brady* requires the government to alert defendants to potential sources of exculpatory evidence known only to the government, it does not make otherwise inadmissible evidence admissible. See *Brady*, 373 U.S. at 88-91 (withheld evidence admissible only on issue of punishment, not guilt, so remand restricted to sentencing; assumes no violation if withheld evidence would not have been admissible); *United States* v. *Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983) (no *Brady* violation from failure to turn over inadmissible evidence). Cf. *United States* v. *Nobles*, 422 U.S. 225, 241 (1975) (Constitution does not give defendant right to present evidence free from legitimate demands of adversary system and does not justify introduction of what might be a half-truth).

[9] The Second Circuit's decision in this case is also at odds with its own decision in *United States* v. *Serna*, 799 F.2d 842 (1986), cert. denied, 481 U.S. 1013 (1987), where, rejecting the claim of a defendant who had sought to introduce the potentially exculpatory testimony of a severed co-defendant in a prior trial, the court held that the testimony was properly excluded under Rule 804(b)(1) because the government lacked "an opportunity and similar motive to cross-examine the witness at the previous trial." 799 F.2d at 849.

v. *Powell*, 894 F.2d 895, cert. denied, 495 U.S. 939 (1990), the Seventh Circuit upheld a trial court's refusal to permit a defendant to introduce his co-defendant's guilty plea allocution, reasoning that the government lacks "the same motive [to examine the declarant] at a plea hearing as it does at other proceedings." *Id.* at 901. The Third Circuit reached the same conclusion in *United States* v. *Lowell*, 649 F.2d 950, 965 (1981). In *United States* v. *Atkins*, 618 F.2d 366, 373 (1980), the Fifth Circuit affirmed a district court ruling that the defendant could not introduce a co-defendant's testimony at a pretrial hearing because the government lacked a motive to cross-examine the co-defendant at that hearing on the relevant issue. Finally, in *United States* v. *North*, 910 F.2d 843 (1990), cert. denied, 111 S. Ct. 2235 (1991), the D.C. Circuit held that the trial court had properly excluded Admiral Poindexter's prior immunized testimony under Rule 804(b)(1). The court held, first, that the Independent Counsel and Congress were not the same party, thus leading to the conclusion that the Independent Counsel had had no "opportunity" to develop Poindexter's congressional testimony. Second, the court held that, "even if Congress and the [Independent Counsel] were the same party," Poindexter's prior immunized testimony could not be introduced by Colonel North because Poindexter's congressional interrogators had lacked a "similar motive" at the hearings. 910 F.2d at 906-908. In each of these cases, the court relied on Rule 804(b)(1) to preclude a defendant from introducing prior testimony by a declarant who was rendered "unavailable" solely by an invocation of the Fifth Amendment. In none was the government's ability to immunize the declarant used as a basis for disregarding the government's lack of motive to cross-examine in the prior proceeding.[10]

Although courts on several occasions have either held or suggested that prior grand jury testimony by a witness thereafter made "unavailable" by invocation of his Fifth Amendment privilege may be admitted against the government at trial under Rule 804(b)(1), each of those cases rested upon findings that the government had, on the facts of those cases, both a "similar motive" and an "opportunity" to cross-examine the witness in the grand jury. See *United States* v. *Miller*, 904 F.2d 65, 68 & n.3 (D.C. Cir. 1990) (government had same motive and opportunity in grand jury as at trial); *United States* v. *Klauber*, 611 F.2d 512, 516-517 (4th Cir. 1979) (suggesting in *dicta* that it could "well imagine" that unavailable witness's prior grand jury testimony "might" have been admitted under Rule 804(b)(1) as having been given in a proceeding where the government "would have had an opportunity and similar motive to develop the testimony by direct examination"), cert. denied, 446 U.S. 908 (1980); *United States* v. *Henry*, 448 F. Supp. 819, 821 (D.N.J. 1978) (assuming without discussion that the government had a similar motive and opportunity to cross-examine in grand jury, but limiting its ruling to "the circumstances of this case * * * without in any way implying any broad or general rule applicable to all

[10] None of the decisions cited above involved prior testimony in the grand jury, and only *United States* v. *North* involved prior testimony given under a grant of immunity. Neither of those factors, however, was critical to the Second Circuit's decision, which was based on the government's ability to make witnesses "available" through immunization, and would extend to the factual settings in each of the other cited decisions.

instances"). Cf. *United States* v. *Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984) (admission of non-testifying declarant's prior grand jury testimony against the government is "a matter for the trial judge's discretion, to be exercised on the basis of his evaluation of the realities of cross-examination and the motive and interest with which the government carried out the prior examination"; no indication of why declarant was unavailable); *United States* v. *Young Bros.*, 728 F.2d 682, 691 (5th Cir.) (while noting that the government had an "opportunity to question the witness fully" in the grand jury, without addressing whether the government had motive to do so, court finds no need to resolve issue because any error would have been harmless), cert. denied, 469 U.S. 881 (1984).

The decision in this case departs, in a critical respect, from each of the decisions cited above. In this case, the Second Circuit declined to find that the "motive" requirement of Rule 804(b)(1) was satisfied, and in fact specifically noted that the government "may have had no motive." App., *infra*, 19a. As Judge Newman recognized in dissenting from the denial of rehearing en banc (App., *infra*, 58a), no other court has read the motive requirement out of the rule, as the Second Circuit has plainly done in this case.

3. In addition to misapplying Rule 804(b)(1), the Second Circuit's decision threatens to bring confusion to other evidentiary principles as well. To be sure, in the November 6 amendment to its opinion, the court stated that it had not "considered * * * whether the government's power to grant immunity would affect a declarant's 'availability' under any of the other subdivisions of Rule 804(b)." App., *infra*, 41a. Notwithstanding that disclaimer, however, there is no

basis for distinguishing between "unavailability" for purposes of Rule 804(b)(1) and "unavailability" for purposes of other provisions of Rule 804(b). Cf. App., *infra*, 60a (Newman, J., dissenting from denial of rehearing en banc). Consequently, the court's ruling in this case could affect the construction of each of the hearsay exceptions under Rule 804(b).

For example, courts have uniformly understood Rule 804(b)(3) to permit the government to introduce statements against penal interest upon a showing that the declarant has been rendered "unavailable" by an invocation of the Fifth Amendment and that the other requirements of Rule 804(b)(3) have been met. See *United States* v. *Garcia*, 897 F.2d 1413, 1420-1421 (7th Cir. 1990); *United States* v. *Boyce*, 849 F.2d 833, 835-837 (3d Cir. 1988); *United States* v. *Briscoe*, 742 F.2d 842, 846-847 (5th Cir. 1984); see also *United States* v. *Williams*, 927 F.2d 95, 98-99 (2d Cir.), cert. denied, 112 S. Ct. 307 (1991); *United States* v. *Winley*, 638 F.2d 560, 562 (2d Cir. 1981), cert. denied, 455 U.S. 959 (1982). In none of those cases was the government's ability to make a declarant "available" through a grant of immunity found to have any impact on the admissibility of the testimony.[11]

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[11] The Second Circuit's creation of an immunity exception to the definition of unavailability is also inconsistent with well-settled law that, where a potential witness has asserted his Fifth Amendment privilege, the defendant is not entitled to a "missing witness" instruction licensing the inference that the potential witness's testimony would be adverse to the government. That rule is based on the premise that a potential witness who has asserted his Fifth Amendment privilege is equally unavailable to both parties, regardless of the fact that the government has the power to grant him immunity and thus make him "available." See *United States* v. *St. Michael's Credit Union*, 880 F.2d 579, 597-598 (1st Cir. 1989); *United States* v. *Brutzman*, 731 F.2d 1449, 1454 (9th

The general refusal, prior to the Second Circuit's decision in this case, to modify the Rule 804(b) hearsay exceptions as applied to the government in cases in which the declarant asserts his Fifth Amendment privilege rests not merely on the plain language of Rule 804(a), but also on the sound principle that the Executive Branch should not be forced to grant immunity to a defendant's confederates as the price of having the courts apply the rules of evidence according to their terms. See *United States* v. *Georgia Waste Systems, Inc.*, 731 F.2d 1580, 1582 (11th Cir. 1984); *United States* v. *Weiner*, 578 F.2d 757, 771 & n.12 (9th Cir.), cert. denied, 439 U.S. 981 (1978); *United States* v. *Lang*, 589 F.2d 92, 95-96 (2d Cir. 1978). That principle in turn reflects the general, and sound, reluctance of courts to grant immunity or compel the government to seek an order of immunity for defense witnesses. See, *e.g.*, *United States* v. *Mitchell*, 886 F.2d 667, 669-670 (4th Cir. 1989); *United States* v. *Doddington*, 822 F.2d 818, 821 & n.1 (8th Cir. 1987); *United States* v. *Williams*, 809 F.2d 1072, 1083 (5th Cir.), cert. denied, 484 U.S. 896 (1987); *United States* v. *Sawyer*, 799 F.2d 1494, 1506-1507 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987). The Second Circuit itself has cogently summarized the rationale for that rule:

> In addition to ensuring that prosecutorial decisions concerning whom to prosecute and what evidence to present at a criminal trial will not be

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Cir. 1984); *United States* v. *Flomenhoft*, 714 F.2d 708, 713-714 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); *United States* v. *Simmons*, 663 F.2d 107, 108 (D.C. Cir. 1979); *United States* v. *Stulga*, 584 F.2d 142, 145-146 (6th Cir. 1978); *United States* v. *Chapman*, 435 F.2d 1245, 1247-1248 (5th Cir. 1970), cert. denied, 402 U.S. 912 (1971). See generally *Graves* v. *United States*, 150 U.S. 118, 121 (1893).

> lightly interfered with by the judiciary, it reduces the possibility of cooperative perjury between the defendant and his witness. A person suspected of crime should not be empowered to give his confederates an immunity bath.

Blissett v. *LeFevre*, 924 F.2d 434, 441-442 (2d Cir.) (internal quotation marks omitted), cert. denied, 112 S. Ct. 158 (1991).

In suggesting that "the government made Bruno and DeMatteis unavailable to the defense by refusing to immunize them at trial," App., *infra*, 23a, the Second Circuit ignored these considerations. Even when the government has found it necessary to immunize witnesses in the grand jury—as it did here—it should not be forced to permit defendants who have conspired with those witnesses to engineer a broader grant of immunity at trial that would provide substantial protection to the witnesses against prosecution for their grand jury perjury and for any other crimes disclosed by their trial testimony. Although, in the grand jury, the government can carefully limit its questioning to matters critical to its investigation —and terminate the questioning at any point—the examination and cross-examination of such witnesses at trial is not subject to similar control, and may result in an effective "immunity bath" for witnesses who would otherwise be prospective subjects of separate prosecution.

4. As Judge Newman recognized, the court of appeals' decision will undoubtedly have a disruptive effect on grand jury investigations in which the government has subpoenaed the target's allies and associates to testify—under grant of immunity or otherwise—and the government believes they have perjured themselves. See App., *infra*, 59a. (New-

man, J., dissenting from denial of rehearing en banc). If the government wishes to avoid immunizing those witnesses at trial but at the same time seeks to prevent the admission at trial of unimpeached grand jury testimony the government believes to be perjurious, the only course left open by the court's decision is for the government to conduct a more vigorous examination of the witnesses before the grand jury. Pursuing such a course, however, could threaten the security of the grand jury's investigation. Especially in an organized crime investigation, confronting a target's ally with evidence obtained from other sources risks compromising those sources and impeding the progress of the investigation. After the Second Circuit's decision, however, a prosecutor may well be forced to subordinate the need to protect the security of the investigation to the need to ensure that testimony rife with perjury not go to a future trial jury effectively unchallenged.

Another practical problem created by the Second Circuit's decision is likely to arise frequently. When an ally of the defendant testifies in the grand jury during the early stages of an investigation, the government may have insufficient knowledge of the relevant facts to conduct effective cross-examination in the grand jury (or even to be aware that the witness has committed perjury). In such situations, the only choices left to the government under the Second Circuit's rule are (1) to immunize the witness at trial, thereby obstructing the prosecution of a possible co-conspirator, or (2) to acquiesce in the admission of the perjury at trial, where the jury might well give it special weight for having been elicited by the government before a grand jury, under oath, and without impeachment. Because the court of appeals' decision represents an unwarranted intrusion into the

government's prosecutorial discretion and a serious obstacle to the ability of trial courts to exclude unreliable evidence, and because the decision is inconsistent with well-settled law in other circuits, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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NOVEMBER 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 1586-1601, Dockets 88-1464, -1470, -88-1474, -1477, -1547; 90-1291, -1292, -1296, -1297, -1301, -1311, -1312 and -1351

UNITED STATES OF AMERICA, APPELLEE

v.

ANTHONY SALERNO, a/k/a "FAT TONY," VINCENT DI NAPOLI, a/k/a "VINNIE," LOUIS DI NAPOLI, a/k/a "LOUIE," MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE," JOHN TRONOLONE, a/k/a "PEANUTS," MILTON ROCKMAN, a/k/a "MAISHE," NICHOLAS AULETTA, a/k/a "NICK," EDWARD J. HALLORAN, a/k/a "BIFF," ALVIN O. CHATTIN, a/k/a "AL," RICHARD COSTA, a/k/a "RICHIE," and ANIELLO MIGLIORE, a/k/a "NEIL," DEFENDANTS

MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE," VINCENT DI NAPOLI, a/k/a "VINNIE," LOUIS DI NAPOLI, a/k/a "LOUIE," NICHOLAS AULETTA, a/k/a "NICK," EDWARD J. HALLORAN, a/k/a "BIFF," ANIELLO MIGLIORE, a/k/a "NEIL," ANTHONY SALERNO, a/k/a "FAT TONY," and ALVIN O. CHATTIN, a/k/a "AL," DEFENDANTS-APPELLANTS

Argued May 8, 1991

Decided June 28, 1991

Before PRATT, MINER, and ALTIMARI, Circuit Judges.

GEORGE C. PRATT, Circuit Judge:

I. INTRODUCTION

For better or for worse, our circuit in recent years seems to have been the locus for "megatrials". *See, e.g., Polizzi v. United States*, 926 F.2d 1311, 1313 (2d Cir.1991) ("This appeal stems from what can only optimistically be called an aberration in the federal judicial system—the RICO megatrial"); *United States v. Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989) (thirty-five defendants charged in RICO indictment, twenty-one defendants tried in joint trial lasting over seventeen months and involving roughly 275 witnesses), *cert. denied*, —— U.S. ——, 110 S. Ct. 1138, 107 L.Ed.2d 1043 (1990); *Proctor & Gamble Co. v. Big Apple Indus. Bldgs., Inc.*, 879 F.2d 10, 12 (2d Cir.1989) ("The [RICO pattern] problem is of serious consequence because a RICO trial often becomes a 'megatrial' with large numbers of unrelated defendants—charged with unconnected wrongs—tried together under the rubric of a single conspiracy"), *cert. denied*, ——U.S. ——, 110 S.Ct. 723, 107 L.Ed 2d 743 (1990).

Defendants are often heard to complain that the government benefits from the ambiguity and confusion which accompanies these gargantuan indictments; despite the complaints, we have responded, sometimes grudgingly, by affirming the lion's share of the convictions in spite of our concerns about the unruliness of such cases. *See, e.g., Casamento*, 887 F. 2d at 1151-53.

Similarly, defendants often complain that, because of the diversity of proof admissible in such an enormous case, they suffer not only from "prejudicial spillover", such as occurs "where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence relating to another," *United States v. Miley*, 513 F.2d 1191, 1209 (2d Cir.) (Friendly, J.), *cert. denied sub nom. Goldstein v. United States*, 423 U.S. 842, 96 S.Ct. 74, 46 L.Ed.2d 62 (1975), but also from prejudice transferred across the line separating conspiracies, or defendants, "so great that no one really can say prejudice to substantial right has not taken place." *Kotteakos v. United States*, 328 U.S. 750, 774, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946).

This case—an enormous one involving bid-rigging in the New York City concrete industry, with numerous small, tangentially-related counts attached like barnacles—creates a problem different from, but related to, the concept of prejudicial spillover: that of "spillover taint". Serious error that occurred during this enormous trial requires the reversal of that portion of the case representing the majority of the convictions. This error, when combined with the aspects of the trial that raise serious questions of fairness, leads us to the conclusion that *all* of the convictions must be reversed. After reversing what was by far the largest portion of the indictment, we cannot really say that prejudice to substantial right would not take place if we left only a few of the collateral convictions intact. The likelihood of spillover taint running from the erroneously-achieved convictions to the remaining few is enough to undermine our confidence in the accuracy of all of the guilty verdicts. We therefore reverse the convictions of all appealing defendants and remand for further proceedings in the district court.

II. FACTS AND BACKGROUND

The history of this case is long and complex. At this point we set forth its general background and outline; further factual details will be discussed later in the opinion where pertinent to specific issues.

A. *The Commission Case*

Well before the indictment in this case was handed down, a much shorter RICO trial (eleven weeks) involving many of the same facts was held in the Southern District of New York. This trial, which came to be known as the "commission case", alleged a RICO enterprise known as the "commission" of La Cosa Nostra:

> The indictment alleged, and substantial evidence at trial established, that the Commission has for some time acted as the ultimate ruling body over the five La Cosa Nostra families in New York City and affiliated families in other cities. The general purpose of the Commission is to regulate and facilitate the relationships between and among the several La Cosa Nostra families, and more specifically to promote and coordinate joint ventures of a criminal nature involving the families, to resolve disputes among the families, to extend formal recognition to "bosses" of the families and on occasion resolve leadership disputes within a family, to approve the initiation or "making" of new members of the families, and to establish rules governing the families, officers and members of La Cosa Nostra. There are five New York families (*i.e.*, the Genovese, Gambino, Colombo, Lucchese and Bonanno families). Since the late 1970s, the Commission was controlled by

> the bosses of four of those families, often acting through their deputies.

United States v. Salerno, 868 F.2d 524, 528 (2d Cir. 1989).

The government charged, as predicate racketeering acts in the commission case, three general commission schemes. One alleged scheme was the concrete contractors' "club":

> The first scheme, an extortion and labor bribery operation known as the "Club," involved all appellants except Indelicato. The Club was an arrangement between the Commission, several concrete construction companies working in New York City, and the District Council, a union headed by Scopo. The Club was a cooperative venture among the Families, and the Commission set rules and settled major disputes arising out of the scheme. The rules of the Club were: only such construction companies as the Commission approved would be permitted to take concrete construction jobs worth more than two million dollars in New York City; any contractor taking a concrete job worth more than two million dollars would be required to pay the Commission two percent of the construction contract price; the Commission would approve which construction companies in the Club would get which jobs and would rig the bids so that the designated company submitted the lowest bid; the Commission would guarantee "labor peace" to the construction companies in exchange for compliance with the rules of the Club; and the Commission would enforce compliance by threatened or actual labor unrest or physical harm, even to the point of

> driving a company out of the concrete business. According to the government, seven concrete construction companies were participants in this extortionate scheme.

Id. at 529.

There was an interesting relationship between the commission case and the timing of the indictments in the case before us. The final (third superseding) indictment in the commission case was filed on March 13, 1986. Eight days later, the initial indictment was filed in this case (the "club case"). The trial of the commission case began on September 8, 1986. Ten days later, the first superseding indictment in the club case was filed. The jury returned its verdicts against the commission defendants on January 13, 1987. Two days later, the government filed its second superseding indictment in the club case.

After an *in banc* hearing as to one commission case defendant, 865 F.2d 1370 (2d Cir.1989), we affirmed all of the convictions, with the exception of one RICO count against one defendant, which we reversed.

B. *The indictment*

On April 7, 1987, a grand jury for the Southern District of New York charged eleven defendants (Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, Aniello Migliore, Matthew Ianniello, John Tronolone, Milton Rockman, and Richard Costa) in a 35-count third superseding indictment. The gravamen of the indictment was that, from 1970 to the date of the indictment, the defendants conspired to and did engage in a racketeering enterprise known as the Genovese Organized Crime Family of La Cosa Nostra (colloquially, the "Genovese family" of "the Mafia").

While engaged in this enterprise, the defendants allegedly committed and conspired to commit numerous crimes, which were charged in the indictment as predicate acts.

Count One charged all eleven defendants with conspiring to conduct the Genovese family's affairs through a pattern of racketeering activity (which consisted of 41 separate predicate acts), in contravention of the RICO conspiracy statute, 18 U.S.C. § 1962(d). The separately enumerated predicate acts charged:

> 1-16 and 19-22: fraud in the concrete construction industry (the "Construction Case")
>
> 17-18: fraud against the International Brotherhood of Teamsters (the "Teamster Case")
>
> 23: illegal labor payoffs
>
> 24: attempted extortion of Andrew Giordano
>
> 25-36: extortion and conspiracy to extort Marathon Enterprises, Inc., extortion of the Player's Club Restaurant, fraud against the New York Zoological Society (collectively, the "Food Case")
>
> 37-40: illegal numbers and bookmaking businesses, and extortionate collection and extension of credit (collectively, the "Rackets Case")
>
> 41: conspiracy to murder John Simone.

Various defendants were charged in each predicate act, but no one defendant was charged with every predicate act, nor were all eleven defendants charged in any one predicate act.

Count Two of the indictment charged all eleven defendants with the substantive crime of conducting

and participating in the activities of the Genovese family in violation of 18 U.S.C. § 1962(c) (the "substantive RICO count").

Counts Three through Thirty-Five charged various of the defendants with mail fraud, conspiracy, extortion, illegal gambling, and extortionate credit extension; these substantive charges corresponded to most of the predicate acts charged in Counts One and Two. The scope of the indictment, and the verdicts returned, are illustrated in the table which is attached as an Appendix to this opinion.

The Appendix illustrates that all defendants were charged with the RICO conspiracy and RICO substantive counts contained in Counts One and Two of the indictment. In addition, it shows that the indictment breaks down into one huge case (the Construction Case, charging seven defendants in sixteen counts); one eleven-count case (the Food Case, in which Costa was charged in all eleven counts, Salerno in nine, and Ianniello in only one); two small cases (the Teamster Case, charging three defendants in two counts; and the Rackets Case, charging Salerno in four counts and Louis DiNapoli in one); and allegations of three additional racketeering acts: illegal labor payoffs (charging only Salerno and Ianniello), attempted extortion of Andrew Giordano (charging only Salerno and Ianniello), and conspiracy to murder John Simone (charging only Salerno and Tronolone).

The Appendix further shows that Ianniello, Tronolone, and Rockman each were charged in only a few counts, while the defendants in the Construction Case represented the major targets of the indictment. Obviously, they were the major targets at the trial, as well.

C. *The Trial*

Trial of this matter began on April 6, 1987, and concluded thirteen months later, on May 4, 1988. Most of the trial was devoted to the prosecution and defense of the Construction Case. The government presented evidence that the Construction Case defendants had participated in a scheme to rig the contracts for concrete superstructure work on high-rise buildings in Manhattan where the value of the concrete work was over $2 million. According to the government, Salerno, along with Vincent DiNapoli, orchestrated the scheme. By establishing control over two essential elements of Manhattan-area concrete contractors' work—labor and ready-mix concrete—Salerno and Vincent DiNapoli were able to keep all of the work on these projects within a select group of contractors, called the "Club". The Genovese family allegedly allocated the jobs among these companies by rigging the bids that they submitted. The Genovese family also allegedly controlled the labor market through corrupt union officials, and controlled the ready-mix market by entering into an alliance with defendant Halloran, to whom the Genovese family granted a monopoly for supplying concrete in Manhattan. The Genovese family profited from this scheme because, according to the government, the owner/developers and construction managers paid to it a two percent surcharge on all concrete jobs performed by Club members.

D. *The Verdicts*

All eight appealing defendants, as well as defendant Costa (who did not appeal his convictions), were convicted of Counts One and Two, the RICO conspir-

acy and substantive RICO counts. Salerno, both DiNapolis, Auletta, Halloran, Chattin and Migliore were all convicted of Counts Three through Eighteen (and found to have committed racketeering acts 1-16), which was the Construction Case. In addition, Halloran was found to have committed four construction-related racketeering acts (predicate acts 19-22) in relation to the RICO conspiracy count, but only two of those same acts (19 and 20) in relation to the substantive RICO count.

The Teamster Case, which was premised on allegations of fraudulent intervention in the elections of Roy L. Williams and Jackie Presser as general presidents of the International Brotherhood of Teamsters, resulted in verdicts of not guilty for all three charged defendants, Salerno, Tronolone, and Rockman. Salerno and Ianniello were, however, found to have committed the related predicate act 23, involving the illegal labor payoffs. The jury was unable to agree on the predicate act involving the alleged extortion of Giordano, which charged only Salerno and Ianniello.

The Food Case alleged extortion of Marathon Enterprises (a New Jersey producer of hot dogs and hot dog buns) and the Player's Club Restaurant, bid-rigging on food service contracts at the Bronx Zoo, and illegal payments to an AFL-CIO official. The Food Case resulted in convictions on all counts involving Salerno and Costa, who were charged in Counts Twenty-One through Thirty-One (and predicate acts 25-36). Ianniello, who was charged in Count Twenty-One (and predicate act 25) along with Salerno and Costa, was likewise found guilty.

On the Rackets Case, which charged Salerno and Louis DiNapoli with running an illegal numbers business and Salerno with illegal bookmaking and extortionate credit practices, the jury found that both Salerno and Louis DiNapoli had committed predicate act 37, involving gambling and loan sharking. Salerno was also convicted of Count Thirty-Two, which corresponded to predicate act 37, but Louis DiNapoli was only charged with the predicate act, not the formal Count. The jury returned verdicts of not guilty on the remainder of the Rackets Case.

Neither Salerno nor Tronolone was found to have conspired to murder John Simone.

The jury further returned forfeiture verdicts against Salerno, Vincent DiNapoli, Auletta, and Halloran, awarding to the government Salerno's interests in S & A Concrete Company and its affiliates from November 1981 through the end of 1984; his interests in Glen Island Casino; and payments from Marathon Enterprises, Inc. totalling $155,000. The jury forfeited to the government Vincent DiNapoli's interests in S & A and the Glen Island Casino. Additionally, the jury ordered that Auletta's interests in S & A Concrete and its affiliates, as well as Big Apple Concrete, be forfeited to the government, and the jury further awarded to the government Auletta's proceeds from the sale of certain property. Finally, the jury ordered forfeited Halloran's interests in Big Apple and Certified Concrete Co., Inc.

E. *The Sentences*

Judge Lowe sentenced Salerno to 70 years in prison and ordered him to pay a fine of $376,000 plus twice the gross profits of his racketeering activities. Vincent DiNapoli was sentenced to 24 years in prison and fined $266,000 plus twice his gross racketeering profits. Migliore received the same sentence and fine as Vincent DiNapoli. Louis DiNapoli was sentenced to 14 years' imprisonment and fined $266,000 plus

twice his gross racketeering profits. Ianniello and Halloran were each sentenced to 13 years in prison; Halloran was fined $266,000 plus twice his gross racketeering profits, while Ianniello was fined $505,000. Chattin was sentenced to six years in prison and fined $16,000. Costa was sentenced to nine years' imprisonment and ordered to pay a fine of $297,000.

F. *The Motions for New Trial*

After the jury had rendered its verdicts, but before sentencing, Salerno—joined by all other convicted defendants—filed a motion for a new trial and for the recusal of Judge Lowe. They claimed to have discovered evidence that Judge Lowe and the United States Deputy Marshal assigned to her courtroom had separately engaged in *ex parte* contacts with the jury during deliberations. Judge Lowe allegedly informed the jury that they had to produce a unanimous verdict, and that no mistrials would be tolerated. The marshall was alleged to have told the foreperson of the jury that "the people outside are getting tired and restless, and if we don't hurry up and make some type of decision, we are going to have to listen to over one hundred audio tapes." He was also alleged to have told another juror," [Y]ou got a pretty bad attitude." The factual allegations are discussed more extensively in Chief Judge Brieants' opinion, 740 F.Supp. 171 (S.D.N.Y. 1990). Based on the written submissions and oral argument, but without conducting an evidentiary hearing, Judge Lowe, in a lengthy opinion reported at 698 F.Supp. 1109 (S.D.N.Y.1988), denied the motion for a new trial as well as the motion for recusal and proceeded to sentencing.

When the defendants appealed, we vacated Judge Lowe's order denying the new trial motion and remanded with specific instructions for a factual inquiry into the defendants' allegations. *United States v. Ianniello*, 866 F.2d 540 (2d Cir. 1989).

On the remand, Chief Judge Brieant conducted the factual inquiry, and once again denied the defendants' motion for a new trial, stating: "On the totality of the evidence this Court concludes that there is no credible evidence that either Judge Lowe or Deputy Marshal Perrine interfered with the deliberations of the jurors or attempted in any way to influence or coerce the trial jury." *United States v. Ianniello*, 740 F.Supp. 171, 195 (S.D.N.Y.1990).

From the judgments of conviction as well as Chief Judge Brieant's denial of their motion for a new trial, eight defendants appeal.

III. DISCUSSION

This megatrial resulted in a mega-appeal, in which the eight appealing defendants filed separate briefs, raising collectively at least sixteen distinct issues. The appellants did not simply repeat each others' arguments; instead, seven of them presented at least one separate argument and in addition adopted by reference the points raised in the others' briefs, pursuant to Fed.R.App.P. 28(i). The government responded with a 300-page typeset brief, addressing the sixteen arguments point-by-point.

Oral argument was a similar ordeal, in which we departed from our usual practices in two ways. First, we allotted for oral arguments two hours (and ended up using three), where we normally allow no more than fifteen minutes per side. Second, in view of the unusual number of significant issues raised, we allowed each advocate for each defendant to make his argument, followed immediately by the government's

rebuttal argument. We heard six different advocates for the appellants, while two assistant United States Attorneys divided the chores for the government. Our task was informed by fine briefing and extraordinary oral advocacy on all sides. Their extensive efforts to cope with a case of this magnitude were commendable.

Although sixteen issues were raised, we have concluded that one of the claimed errors—the erroneous exclusion from evidence of certain grand jury testimony—so tainted the entire trial that reversal and a new trial is required for all eight appealing defendants. It is necessary, in addition, to comment on three other issues—Ianniello's proffered bias defense, evidence of inconsistent positions taken by the government against Auletta, and the serious allegations of misconduct—in order to be sure these problems do not arise again.

A. *The Grand Jury Testimony of Bruno and DeMatteis*

1. Background

Pursuant to its obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the government informed defendants Vincent and Louis DiNapoli that Pasquale J. Bruno and Frederick DeMatteis had testified under immunity before the grand jury, and that counsel for the defendants might wish to speak to those witnesses, as they were sources of potentially exculpatory evidence. Both Bruno and DeMatteis were principals in Cedar Park Concrete Construction Corporation ("Cedar Park"), one of the companies alleged to have been a member of the "Club" of concrete contractors.

At trial, counsel for the defendants called Bruno and DeMatteis to the stand, whereupon each asserted

his fifth amendment privilege against self-incrimination. Although requested to do so by defense counsel, the government refused to immunize Bruno and DeMatteis. Defendants then moved the district court to direct the government to furnish copies of the grand jury minutes so that they could introduce the witnesses' grand jury testimony under Fed.R.Evid. 804 (b) (1), the "former testimony" exception to the hearsay rule for unavailable declarants.

After examining privately the grand jury minutes as well as other materials supplied by the government (all of which were transmitted to the district court under seal), and hearing *in camera* arguments from the government about the content and admissibility of the grand jury testimony, Judge Lowe denied the motion. She reasoned that the government's motive to examine a grand jury witness is "far different from the motive of a prosecutor in conducting the trial"; thus, she held, the grand jury minutes were inadmissible under rule 804(b)(1).

2. Federal Rule of Evidence 804(b)(1)

Federal Rule of Evidence 804(b)(1) provides, in pertinent part:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> 1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding * * *, if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

This former testimony exception to the hearsay rule is arguably "the strongest hearsay", because of all the ideal conditions for the giving of testimony (oath, opportunity for cross-examination, presence of trier of fact, and presence of opponent), only the latter is absent. Fed.R.Evid. 804 advisory committee's note. *See E. Cleary, McCormick on Evidence*, § 245, at 726-29 (3d ed. 1984). *See also Weissenberger, The Admissibility of Grand Jury Transcripts: Avoiding the Constitutional Issue*, 59 Tul.L.Rev. 335, 344 (1984) (former testimony exception based on necessity, accuracy, and fairness to party against whom offered). We must keep these considerations in mind as we interpret the rule.

a. Declarant Unavailable?

Federal Rule of Evidence 804(a)(1) provides:

> (a) Definition of unavailabilty. "Unavailability as a witness" includes situations in which the declarant—
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; * * *.

We have long recognized that "unavailability" includes within its scope those witnesses who are called to testify but refuse based on a valid assertion of their fifth amendment privilege against self-incrimination. *See, e.g., United States v. Salvador*, 820 F.2d 558, 560 (2d Cir.), *cert. denied*, 484 U.S. 966, 108 S.Ct. 458, 98 L.Ed.2d 398 (1987); *United States v. Rodriguez*, 706 F.2d 31, 40 (2d Cir.1983); *United States v. Beltempo*, 675 F.2d 472, 480 (2d Cir.), *cert. denied*, 457 U.S. 1135, 102 S.Ct. 2963, 73 L.Ed.2d 1353 (1982).

Thus, it is without question that once they were subpoenaed and had invoked their fifth amendment privilege, both Bruno and DeMatteis became "unavailable" to the defendants, who could not compel them to testify.

However, the government could compel that testimony through a grant of use immunity. The "unavailability" of a witness under rule 804 depends on the situation of the parties and their relationship to the witness. *See* J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 804(a)[01], at 804-36 (1990) ("the crucial factor is not the unavailability of the witness but the unavailability of his testimony."). "A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the *proponent* of a statement for the purpose of preventing the witness from attending or testifying." Fed.R. Evid. 804(a) (emphasis added). In such a case, the witness is not "unavailable" to the proponent, who is thereby prevented from invoking rule 804(a). That same principle of adversarial fairness should prevent the *opponent* of a hearsay declaration from invoking the protections of rule 804(b)(1) when the declarant, although unavailable to the *proponent*, is available to the *opponent* of the declaration. "If the witness has been by the *opponent procured* to absent himself, this ought of itself to justify the use of his deposition or former testimony * * *." 5 J. Wigmore, *Evidence in Trials at Common Law* § 1405, at 218-19 (Chadbourn rev. 1974) (emphasis in original). In short, the testimony of Bruno and DeMatteis was available to the government but unavailable to the defendants.

b. Testimony given as a witness at another hearing of the same or another proceeding?

Grand jury testimony, doubtlessly, is "former testimony" under rule 804(b)(1). *See United States v. Vigoa*, 656 F.Supp. 1499, 1505 n. 5 (D.N.J. 1987) ("It is undeniable * * * that grand jury testimony constitutes 'former testimony' specifically covered by Rule 804(b)(1)"), *aff'd*, 857 F.2d 1467 (3d Cir. 1988) (mem.); *cf. United States v. Salim*, 855 F.2d 944, 952-53 (2d Cir.1988) (oath or affirmation and verbatim translation satisfy "former testimony" requirement); Fed.R.Evid. 804 advisory committee's note. Here, both oath and verbatim transcription were present in the grand jury testimony: both witnesses were sworn, and the proceedings were transcribed by a certified shorthand reporter.

c. Opportunity and similar motive?

This is not the first time that the grand jury testimony of Bruno and DeMatteis has been the subject of dispute in this court. In the commission case, one of the appellants also argued that the failure to turn over the grand jury testimony of Bruno and DeMatteis violated both *Brady* and Fed.R.Evid. 804(b)(1). The government there had taken the position that it would produce the grand jury minutes only if and when Bruno was called as a witness. 868 F.2d at 542 n. 7. We held that its position "does not violate *Brady*". *Id. See also* Brief for Government at 188-90, *United States v. Salerno*, 868 F.2d 524 (2d Cir. 1989) (No. 87-1075). We further held that since the appellant had not called the declarants as witnesses to permit them to refuse to testify at the trial, he had

failed to show that either declarant was "unavailable". *Salerno*, 868 F.2d at 542 & n. 8.

Here, in contrast, the defendants called both men to the stand out of the jury's presence and, when asked a series of questions, both men invoked the fifth amendment in response to each question. Thus, the defendants filled in the gap that had defeated the appellant in the commission case. But to keep the trial jury from hearing the grand jury testimony of these two witnesses, the government raised still another objection: that it did not have a "similar motive" to develop the witnesses' testimony before the grand jury as required under rule 804(b)(1). Since all other requirements for admission of the testimony were satisfied, this similar-motive contention becomes the focus of the dispute on this appeal.

The government vigorously contends that they lacked a "similar motive" to develop the testimony in front of the grand jury, since they believed that the witnesses had committed perjury therein. By *ex parte* affidavits filed under seal, the government maintained that they have "little or no incentive to conduct a thorough cross-examination of Grand Jury witnesses who appear to be falsifying their testimony to assist Grand Jury targets or other witnesses." The government argued, and the district court agreed, that the government's motive in developing testimony in front of a grand jury is so different from the motive at trial that the rule 804(b)(1) hearsay exception does not apply. Accordingly, the district court refused the defendants' offer of the grand jury testimony of Bruno and DeMatteis.

While we agree that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis, we

do not think that is sufficient to exclude the evidence at trial. The "similar motive" requirement of rule 804(b)(1) protects the party to whom the witness is "unavailable" in order to accord that party some degree of adversarial fairness, thereby assuring that the earlier treatment of the witness is the rough equivalent of what the party against whom the statement is offered would do at trial if the witness were available to be examined by that party. When the declarant is unavailable to the party against whom the testimony is being offered, the "similar motive" requirement not only ensures that the right of cross-examination is preserved, but also ensures that the party against whom the testimony is offered has been afforded a fair chance to seek the truth, and is not blindsided at trial by the hearsay testimony. *See United States v. Young Bros., Inc.*, 728 F.2d 682, 691 (5th Cir.) ("This concern is not present in this case because it was the party offering the testimony, the appellant, who had not had the opportunity to cross-examine."), *cert. denied*, 469 U.S. 881, 105 S.Ct. 246, 83 L.Ed.2d 184 (1984); *United States v. Vigoa*, 656 F.Supp. at 1505 ("By conditioning admission upon proof that party against whose interest the testimony is offered was adequately represented during the development of testimony, Rule 804(b)(1) incorporates considerations of adversarial fairness into the evidentiary analysis.").

Had Bruno and DeMatteis been, for example, ill or dead at the time of trial (and therefore, under rule 804(a)(4), "unavailable" to *either* side), the district court would have properly inquired whether the government had a "similar motive" to examine them in the grand jury before allowing their testimony before the grand jury to be admitted under rule 804(b)(1),

because neither the government nor the defendant would be able to examine the witness at trial. But since these witnesses were available to the government at trial, through a grant of immunity, the government's motive in examining the witnesses at the grand jury was irrelevant. When the reason for the requirement evaporates, so does the requirement. *See* 2A *N. Singer, Sutherland Statutory Construction* § 45.12, at 54-55 (4th ed. 1984).

We are cognizant of the reliability concerns that have led courts to exclude grand jury testimony from use *by the prosecution* at trial. *See, e.g., United States v. Thevis*, 665 F.2d 616, 629 (5th Cir. Unit B), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982):

> Grand jury testimony, although given under oath, is not subjected to the vigorous truth testing of cross-examination, as is prior testimony. Grand jury testimony, moreover, is often given under grant of immunity which might encourage a witness to "embellish" his story.

See also McKethan v. United States, 439 U.S. 936, 938, 99 S.Ct. 333, 334, 58 L.Ed.2d 333 (1978) (Stewart, J., dissenting from the denial of certiorari) (noting, *inter alia*, that no one is present to "give the defendant's version of the story"); *United States v. West*, 574 F.2d 1131, 1138-39 (4th Cir.1978) (Widener, J., dissenting) (confrontation clause concerns where grand jury testimony introduced against defendant).

But when the *defendant* wishes to introduce the grand jury testimony that the government used to obtain his indictment, those concerns about reliability and accuracy are absent. Every factor present in the

grand jury—the *ex parte* nature of the proceeding, the leading questions by the government, the absence of the defendant, the tendency of a witness to favor the government because of the grant of immunity, the absence of confrontation—is adverse to the interest of the defendants, not the government. Yet it is the government here which seeks to avail itself of the protections of Fed.R.Evid. 804(b)(1). Since the witnesses were only unilaterally "unavailable" and could have been subjected to cross-examination by the government, we will not countenance the exclusion of their grand jury testimony on the ground of purported fairness to the government.

It is indeed troubling to us that after identifying Bruno and DeMatteis as exculpatory witnesses under *Brady*, the government then sought to make it impossible for the defendants to obtain the exculpating testimony. In resisting the admission of the grand jury transcripts, the government was not true to the letter or spirit of *Brady*, where the Supreme Court said:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97. To say that the government satisfied its obligation under *Brady* by informing the defendants of the existence of favorable evidence, while simultaneously ensuring that the defendants could neither obtain nor use the evidence, would be nothing more than a semantic somersault. However, we rest our decision on our interpretation and application of Fed.R.Evid. 804(b)(1), and not *Brady v. Maryland*, keeping in mind the

time-honored rule that we should not reach constitutional issues unless absolutely necessary.

In so holding, we note that the government is in no way *required* to grant use immunity to a witness called by the defense; it is simply left with a series of choices. Immunity remains "pre-eminently a function of the Executive Branch." *United States v. Turkish*, 623 F.2d 769, 776 (2d Cir.1980) (citing *Ullman v. United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956)), *cert. denied*, 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981); *United States v. Lang*, 589 F.2d 92, 96 (2d Cir.1978) (collecting cases). *See also* 18 U.S.C. § 6003 (immunity in court and grand jury proceedings).

The government is no stranger to such choices; in fact, it made a similar choice when Bruno and DeMatteis were originally called before the grand jury. In front of the grand jury, the government felt it had to make a smaller sacrifice (by granting Bruno and DeMatteis use immunity) in order to achieve the greater goal of indicting the defendants. To make a similar choice at trial is not too great a burden to cast on the government.

The government, of course could have granted initially defendants' request to immunize Bruno and DeMatteis, heard their live testimony, and thereby prevented admission of the grand jury transcripts, for then the witnesses would have been available to both sides. However, once the government made Bruno and DeMatteis unavailable to the defense by refusing to immunize them at trial, the grand jury transcript should have been admitted as prior testimony of an unavailable declarant under rule 804(b)(1). At that point, the government would have been faced with another choice: it could have then im-

munized the witnesses and called them to testify about their grand jury testimony. Had it done so, Fed.R.Evid. 806 would have permitted the government to cross-examine these witnesses even though it would have been the government who had called them. Or, it could have chosen not to immunize the witnesses, and thereby waived its right to any further live examination. Had it chosen this course, rule 806 still would have permitted impeachment of Bruno and DeMatteis as hearsay declarants, as if they were actually testifying, and the rule exempts the government from the usual condition that a witness's prior inconsistent statement may not be used without first confronting the witness with the statement. In other words, after the grand jury testimony of Bruno and DeMatteis was admitted, the government would have a full and fair opportunty to discredit that testimony.

In short, the district court erred in excluding the exculpatory grand jury testimony of Bruno and DeMatteis. That testimony was former testimony given by a declarant unavailable to the defendants, and the opportunity and similar motive to develop the testimony in front of the grand jury is irrelevant, because the declarants were not similarly unavailable to the government at trial.

3. The scope of the error

The error in excluding the grand jury testimony would be reversible error, however, only if the evidence is "material"; that is, "if there is a reasonable probability that, had the evidence been [admitted], the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); *see also United States v. Underwood*, 932 F.2d 1049 (2d Cir.1991). After reviewing the grand jury minutes, which were transmitted to us under seal, our confidence in the outcome is sufficiently undermined to require reversal of the convictions based on the Construction Case.

Pacquale Bruno and Frederick DeMatteis were both principal players in Cedar Park, one of the largest contractors in the metropolitan New York City concrete industry. Arguably, without their participation there could be no "club" of concrete contractors. Very generally stated, their grand jury testimony denied any awareness of, let alone participation in, such a "club". If this testimony had been believed, it is reasonably probable that the jury would have concluded either that no such "club" existed, or at the very least that there was reasonable doubt as to its existence. Without the "club", the Construction Case simply dissolves. Indeed, the central importance of the "club's" existence is probably why the government felt obligated to identify Bruno and DeMatteis as sources of exculpatory testimony under *Brady v. Maryland*. Excluding their grand jury testimony therefore requires, at the very least, reversal of the Construction Case convictions.

But we cannot stop there. As discussed at the beginning of this opinion, the Construction Case formed the core of the RICO charges—we analogized the remaining counts and predicate acts to "barnacles" on the ship that was the Construction Case. Without a ship, however, barnacles have nothing to cling to. Because such a huge portion of this case must be reversed on this single evidentiary error, and because

the spillover taint undermines the convictions on the lesser counts as well, we reverse the convictions of all eight appealing defendants *in toto*.

The Food Case—the largest portion of the indictment aside from the Construction Case—was not directly affected by the exclusion of the grand jury testimony. However, given that the Food Case involved only Salerno (and on one count, Ianniello, whose convictions we would reverse on other grounds set forth below), we would be less than honest if we said that there was not a "reasonable probability" that the erroneously-achieved Construction Case verdicts had tainted these verdicts as well. The likelihood of prejudicial taint, from the numerous erroneous verdicts to the remaining few, is simply too great for us to ignore. "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." *Kotteakos*, 328 U.S. at 774, 66 S.Ct. at 1252.

B. *Ianniello's Bias Defense*

During the government's case-in-chief, the only evidence presented against Matthew Ianniello was tape-recorded evidence. All of this evidence was gathered by agents of the Federal Bureau of Investigation, who—pursuant to their obligation to "minimize" the conversations they were taping—switched the tape recorder on and off, selectively recording Ianniello's conversations. From these tape recordings, the FBI agents prepared transcripts, which were ultimately submitted to the jury.

Ianniello prepared a similar set of transcripts from the tapes, but they differed from the govern-

ment's versions in numerous instances. Based on these differences as well as on the agents' opportunity to select what they recorded, one of Ianniello's defenses was that the FBI agents were biased against Ianniello, and deliberately selected their recordings so as to reflect unfavorably on him. A major part of the defense was that the agents' bias was established by their mistranscribing of Ianniello's conversations.

During cross-examination of the FBI agents, counsel for Ianniello attempted to examine the agents on the subject of their alleged bias against him, and particularly on the instances of mistranscription. At numerous points in the record, Judge Lowe made it clear that such inquiries into the intent and motivation of the agents in preparing the tapes and transcripts would have to wait until Ianniello's own case. At one point, she said:

> I have made the blanket rule that there will be no more making these witnesses their own [referring to the defendants] for purposes of impugning the integrity of those witnesses. They are going to have to do it on their own case.

At the same time, Judge Lowe recognized the propriety of Ianniello's bias defense, as this colloquy demonstrates:

> THE COURT: Wait a minute, I'm not finished. If you as the defense lawyer believe that you can demonstrate in your case a pattern of these errors which would lead a jury to infer some kind of bias or prejudice or just plain venality on the part of these agents, you have every right to do that.

I have consistently said you have the right to do that. That's why I do not see what the problem is.

MR. NEWMAN: Judge—

MR. GOLDBERG: What you're saying is that it can await the defense case and—

THE COURT: Yes.

However, when Ianniello's counsel, Jay Goldberg, attempted to recall the FBI agents during his side of the case, he was met with resistance from both the government and Judge Lowe:

MR. COHEN: * * * For whatever tactical reasons the record will disclose that with some agents when they offered the transcripts various lawyers chose to examine with respect to whether the transcripts are fair and accurate, whether the agents had a motive or bias against the defendants. Those were tactical choices made by all the lawyers, including Mr. Goldberg.

* * * * *

Those are tactical decisions which throughout the case, as each group of transcripts were put in, the lawyers made, Mr. Goldberg included. Similarly as transcripts were played the defendants' counsel made their decisions as to whether to play the tape and offer at that moment their alternate transcript, a tactical decision made by the respective counsel.

They made their choice but the record here more than amply reflects that anybody who wanted to cross examine an agent with respect to whether he was out to frame the defendant when a transcript was offered, when the tapes were offered, could well have done that. Sometimes they did, sometimes they didn't. That is all I have to add.

MR. GOLDBERG: I have nothing to add, Judge.

THE COURT: Mr. Goldberg, what agents do you believe you have the right to call?

MR. GOLDBERG: I have a right to call Agents Kelleher, Fanning and Butchko.

THE COURT: That request is denied.

We are acutely aware that an abuse of discretion standard governs our review of trial court decisions to limit cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); *United States v. Maldonado-Rivera*, 922 F.2d 934, 956 (2d Cir. 1990); *Harper v. Kelly*, 916 F.2d 54, 57 (2d Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1403, 113 L.Ed.2d 459 (1991). We are similarly aware, as the government reminds us, that a defendant does not have an absolute right to examine a government witness to elicit evidence of bias. In *United States v. Blackwood*, 456 F.2d 526 (2d Cir.), *cert. denied*, 409 U.S. 863, 93 S.Ct. 154, 34 L.Ed.2d 110 (1972), cited by the government, we held that the district court's refusal to recall a government witness during a defendant's case was not an abuse of discretion where the defendant failed to show "any valid reason for his failure to use the material then in his possession during his earlier cross-examination of that witness." *Id.* at 529-30.

This case is completely unlike *Blackwood*, though, and for obvious reasons. Judge Lowe clearly, explicitly, and repeatedly instructed counsel for Ianniello that questioning the agents about bias and illicit mot-

tive would have to wait for the defense case. But then, when the time for his defense case arrived, she again denied him the opportunity based on the prosecutor's contention that he "could well have done that" on his earlier cross-examination of the agents. We see no way that Judge Lowe's about-face can be justified.

This was not a harmless error. By instructing Ianniello to wait to make the bias inquiry, and then refusing to allow it, the district court effectively prevented Ianniello from presenting a defense. This was an error of constitutional magnitude. The Supreme Court has long held that criminal defendants have, at a minimum, "the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 1000, 94 L.Ed.2d 40 (1987). *See also Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (Mississippi common law rule forbidding impeachment of one's own witness deprived defendant of his right to defend against state's charges). "[A] trial court must allow some cross-examination of a witness to show bias." *United States v. Abel*, 469 U.S. 45, 50, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984) (citing *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931)); *see also Olden v. Kentucky*, 488 U.S. 227, 231-32, 109 S.Ct. 480, 482-83, 102 L.Ed.2d 513 (1988) (per curiam); *Delaware v. Van Arsdall*, 475 U.S. at 677, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674. Judge Lowe's inconsistent and unexplainable rulings deprived Ianniello of his right to present a defense, and constituted reversible error.

C. *The Government's Inconsistent Positions*

Nicholas Auletta contends that the district court abused its discretion by precluding him from estab-

lishing that the government had prosecuted the commission case under the theory that Auletta—like many other contractors—was a victim of extortion by the members of the commission, a theory that was inconsistent with the government's position in this case. He argues that he should have been able to introduce the indictment, as well as the government's opening and closing statements from the commission case as admissions of a party-opponent under Fed.R. Evid. 801(d)(2). The government argues that the exclusion of this evidence was well within Judge Lowe's discretion, since being a victim of extortion is not inconsistent with fraudulent bid-rigging, the charge against Auletta in this case.

Since we reverse the convictions of all defendants on other grounds, it is not necessary to reach this issue in order to decide this appeal. Nevertheless, since a retrial is likely, we offer some guidance on this subject. An indictment is not admissible as an admission of a party-opponent, since it is "the charge of a grand jury, and a grand jury is neither an officer nor an agent of the United States, but a part of the court." *Falter v. United States*, 23 F.2d 420, 425 (2d Cir.) (L. Hand, J.), *cert. denied*, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1928). *See also United States v. GAF Corp.*, 928 F.2d 1253, 1261 (2d Cir. 1991) (quoting *Falter*).

However, the jury arguments are another story. In *United States v. McKeon*, 738 F.2d 26 (2d Cir.1984), we refused to adopt a *per se* prohibition on the use of prior opening statements in criminal trials. There, in language particularly appropriate to this case, we said:

> To hold otherwise would not only invite abuse and sharp practice but would also weaken confi-

> dence in the justice system itself by denying the function of trials as truth-seeking proceedings. That function cannot be affirmed if parties are free, wholly without explanation, to make fundamental changes in the version of facts within their personal knowledge between trials and to conceal these changes from the final trier of fact.

Id. at 31. Recognizing that serious collateral consequences could result from the unbridled use of such statements, we there circumscribed the evidentiary use of prior jury arguments. First, "the district court must be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial." *Id.* at 33. Second, the court must determine "that the statements of counsel were such as to be the equivalent of testimonial statements" made by the client. *Id.* Last, the district court must determine by a preponderance of the evidence that the inference that the proponent of the statements wishes to draw "is a fair one and that an innocent explanation for the inconsistency does not exist." *Id.*

The government seeks to explain the seeming inconsistency by reference to our decision in the commission case, *United States v. Salerno*, 868 F.2d 524 (2d Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989). The commission case was different from this case (the "club case"), according to the government's brief, in the following ways:

> Because the Commission prosecution focused on the crimes committed by the organized crime originators of the Club in forming that group, no members of the Club were prosecuted in that case. Nonetheless, the investigation had made

> clear that even as the contractors had been forced to pay tribute to the Mob they had cooperated in a massive bid-rigging fraud on every major public and private developer in New York between 1981 and 1985. It was to prosecute this fraud that a second case, [the club case], was brought. Among the defendants charged in this prosecution was Nicholas Auletta, for whom the Club proved not a straightjacket but a springboard to spectacular economic success.

In this case, Auletta was prosecuted for—and convicted of—violating the mail fraud statute, 18 U.S.C. § 1341. To convict Auletta of mail fraud, the government had to show, *inter alia*, that the mailings were done "for the purpose of" rigging bids. Auletta attempted to introduce the government's opening and closing statements from the commission case in order to counter the government's theory that the acts of mailing were done by him with the purpose of executing a scheme to defraud.

We believe, in light of the specific intent requirement of the mail fraud statute, the district court abused its discretion in refusing to admit evidence that might have disproved that Auletta had the purpose of rigging bids in mind when he deposited the bids in the mail. Had the jury viewed Auletta the way the government did in the commission case, they might have concluded that his purpose was other than bid-rigging when he deposited the bids in the mail. These excerpts from the government's closing argument in the commission case are illustrative:

> Just two months before in February of 1984, Auletta's position is described. Here in this tape you have Furnari, Migliore and Cafaro talking.

I talked about it before. And Furnari has asked to have North Berry swap a job with S & A. And Migliore is angry that at first it seems that Nicky Auletta has been audacious enough to resist this. Then what does Cafaro say? He tells you something that sums it up in just a phrase. Cafaro explains, "You can't really blame Nicky." Using his words, "He is like a puppet on a string."

* * * * *

Now, ladies and gentlemen, in their openings defense counsel said that you would find that the Club contractors wanted to join the Club; they were the ones who initiated the scheme to develop a Club; the contractors rushed into the arms of the Mafia; and that's what these gentlemen, the defense counsel, are going to try to get you to believe, that this was nothing more than simply a bid-rigging scheme that was working just to the advantage of the contractors.

Well, it is true, certainly, that the Club scheme involved bid-rigging. But the bid-rigging was being dominated, was being controlled not by the contractors, but, as you have heard over and over again, literally dozens of times in the tapes, it was the mob that was making the decisions about the bids and who would bid high and who would bid low.

Apparently, the government has taken the same evidentiary clay that they used in the commission case and, for purposes of this trial, resculpted Auletta from a "puppet on a string" to a bid-rigger. The government was free to choose, for tactical or other reasons, not to join Auletta in the commission case, and to postpone his prosecution until they brought the club case. Even so,

> [t]he jury is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims. Confidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts.

United States v. GAF Corp., 928 F.2d at 1260.

In summary, this is a telling example of one of the problems the government creates by framing such huge indictments. A prosecution of this magnitude is necessarily generalized and even vague in some respects, and the "differences" between the commission case and the club case illustrate just how malleable such a prosecution can become. Perhaps Auletta was a culpable bid-rigger; perhaps he was a puppet on a string. The government, at different times, has urged both—and the jury was entitled to know that, because the jury, and not the government, must ultimately decide which he was.

D. *The Alleged Jury Door Incident*

On a previous appeal of this case heard by another panel of this court, very serious allegations of misconduct by the trial judge and a court officer were made. *United States v. Ianniello*, 866 F.2d 540 (2d Cir. 1989), *vacating and remanding United States v. Salerno*, 698 F.Supp. 1109 (S.D.N.Y.1988) (Lowe, J.). That panel remanded the matter to the district court for an inquiry to determine (1) whether the judge or the courtroom marshal made the alleged *ex parte* statements to the jury; (2) what each said, if

anything; (3) the factual circumstances surrounding any such contacts; and (4) whether the jurors who heard the alleged statements communicated them to the other jurors. *Ianniello*, 866 F.2d at 544.

On remand, Chief Judge Brieant of the Southern District conducted the inquiry, and concluded that "there is no credible evidence that either Judge Lowe or Deputy Marshal Perrine interfered with the deliberations of the jurors or attempted in any way to influence or coerce the trial jury." *Ianniello*, 740 F.Supp. at 195.

On appeal, all defendants contend that the procedures followed on the remand were unfair and that the findings by Chief Judge Brieant were clearly erroneous. Again, since we reverse the convictions of all appealing defendants on other grounds, it is unnecessary to decide these issues in order to resolve this case. We are left, however, with a nagging sense of frustration at Judge Lowe's certification in affidavit form that she does not recall having appeared at the jury door or ever telling the jury to acquit or convict. Had such conduct actually occurred we would, of course, uniformly reverse. We are left, however, with Chief Judge Brieant's finding in the matter, which is not clearly erroneous.

We do have some question as to whether the district court's finding that the deputy marshal was "lacking any motive to lie", *see* 740 F.Supp. at 182, was clearly erroneous, for in the very next paragraph of his opinion, Chief Judge Brieant points out that "[a] Deputy Marshal who violates his oath while having custody of jurors risks severe punishment, including discharge from his employment." *Id.* With his job at stake, any deputy marshal charged with making improper comments about the case to a de-

liberating juror would not be "lacking any motive to lie".

Nevertheless, because we reverse on other grounds, we need not make these determinations. Because such conduct would be so far beyond the bounds of permissible behavior by anyone connected with the courts, we do not expect that the issue will arise ever again.

IV. CONCLUSION

The convictions of Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, Aniello Migliore, and Matthew Ianniello, are reversed, and the case is remanded for further proceedings.

APPENDIX

Analysis of Counts and predicate acts in United States v. Salerno, et al.

Predicate/Count and "Case"	Salerno	Vincent DiNapoli	Louis DiNapoli	Auletta	Halloran	Chattin	Migliore	Ianniello	Tronolone	Rockman	Costa
--/1 RICO Consp.	G	G	G	G	G	G	G	G	N	N	G
--/2 RICO Subst.	G	G	G	G	G	G	G	G	N	N	G
1/3 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
2/4 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
3/5 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
4/6 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
5/7 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
6/8 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
7/9 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
8/10 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
9/11 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
10/12 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
11/13 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
12/14 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
13/15 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
14/16 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
15/17 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
16/18 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
17/19 Teamsters	N/N		—						N/N	N/N	
18/20 Teamsters	N/N								N/N	N/N	
19/-- Construction					G*/-						
20/-- Construction					G*/-						
21/-- Construction					G/--						

APPENDIX—Continued

Analysis of Counts and predicate acts in United States v. Salerno, et al.

Predicate/Count and "Case"	Salerno	Vincent DiNapoli	Louis DiNapoli	Auletta	Halloran	Chattin	Migliore	Ianniello	Tronolone	Rockman	Costa
22/-- Construction				—	F/--						
23/-- Labor Payoff	F/--							F/--			
24/-- Giordano	S/--							S/--			
25/21 Food	F/G							F/G			F/G
26/22 Food	F/G										F/G
27/23 Food	F/G										F/G
28/24 Food	F/G										F/G
29/25 Food	F/G										F/G
30/26 Food	F/G										F/G
31/27 Food	F/G										F/G
32/28 Food	F/G										F/G
33/29 Food											F/G
34/30 Food											F/G
35/31 Food	F/G										F/G
36/-- Food											F/--
37/32 Rackets	F/G		F/NC								
38/33 Rackets	N/N										
39/34 Rackets	N/N										
40/35 Rackets	N/N										
41/-- Simone	N/--							N/--			

G = Guilty F = Found N = Not guilty or Not found S = Split decision

* = Jury found Halloran had committed racketeering acts 19 and 20 as to Count One, but not as to Count Two.

NC = Louis DiNapoli was not charged in the substantive count.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of November, one thousand nine hundred and ninety-one.

PRESENT: HONORABLE GEORGE C. PRATT,
HONORABLE ROGER J. MINER,
HONORABLE FRANK X. ALTIMARI,
Circuit Judges.

Nos. 88-1464, -1470, -1472, -1473, -1474, 1477, -1547;
90-1291, -1292, -1296, -1297, -1301, -1311,
-1312, -1351

UNITED STATES OF AMERICA, APPELLEE,

- against -

ANTHONY SALERNO, a/k/a "FAT TONY", VINCENT DI NAPOLI, a/k/a "VINNIE", LOUIS DI NAPOLI, a/k/a "LOUIE", MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE", JOHN TRONOLONE, a/k/a "PEANUTS", MILTON ROCKMAN, a/k/a "MAISHE", NICHOLAS AULETTA, a/k/a "NICK", EDWARD J. HALLORAN, a/k/a "BIFF", ALVIN O. CHATTIN, a/k/a "AL", RICHARD COSTA, a/k/a "RICHIE", and ANIELLO MIGLIORE, a/k/a "NEIL", DEFENDANTS,

MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE", VINCENT DI NAPOLI, a/k/a "VINNIE", LOUIS DI NAPOLI, a/k/a "LOUIE", NICHOLAS AULETTA, a/k/a "NICK", EDWARD J. HALLORAN, a/k/a "BIFF", ANIELLO MIGLIORE, a/k/a "NEIL", ANTHONY SALERNO, a/k/a "FAT TONY", and ALVIN O. CHATTIN, a/k/a "AL", DEFENDANTS-APPELLANTS.

[Filed Nov. 6, 1991]

IT IS HEREBY ORDERED that the last sentence of Part IIIA2a of the opinion in this case, now published at 937 F.2d 797, 805, is hereby deleted and replaced with the following:

> Thus, in interpreting Rule 804(b)(1) and particularly the condition attached to that rule requiring a "similar motive" to develop the prior testimony, we view the testimony of Bruno and DeMatteis as available to the government but unavailable to the defendants. It goes without saying, of course, that we have not considered in this case, because the issue is not before us, whether the government's power to grant immunity would affect a declarant's "availability" under any of the other subdivisions of Rule 804(b).

/s/ George C. Pratt
GEORGE C. PRATT, U.S.C.J.

/s/ Roger J. Miner
ROGER J. MINER, U.S.C.J.

/s/ Frank X. Altimari
FRANK X. ALTIMARI, U.S.C.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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86 Cr. 245 (MJL)

UNITED STATES OF AMERICA

-v-

ANTHONY SALERNO, ET AL., DEFENDANTS

[Filed Feb. 1, 1988]

MEMORANDUM OPINION AND ORDER

MARY JOHNSON LOWE, D. J.

Defendants Vincent DiNapoli and Louis DiNapoli were informed by the government that Fred DeMatteis and Pasquale Bruno had testified under immunity before the grand jury which returned the indictment in this case and that DiMatteis and Bruno should be interviewed by the defendants under *Brady v. Maryland*, 373 U.S. 83 (1963).

DiMatteis and Bruno were subpoenaed to testify as defense witnesses on trial. Under questioning by the Court, each asserted the Fifth Amendment privilege against self-incrimination, which assertion the Court found had a basis in fact.

Counsel for Louis and Vincent DiNapoli then moved that this Court direct the government to furnish defense counsel copies of the grand jury testimony of Bruno and DiMatteis [1] under Fed. R. Ev. 804(b)(1).[2] The government opposed the motion, and, when queried, also opposed granting immunity to Bruno and DiMatteis for purposes of the trial.

Background

The moving defendants are charged in the indictment, *inter alia*, with participation in a scheme to defraud owners of high rise concrete superstructures in Manhattan by rigging bids for the concrete work. DiMatteis and Bruno were both principals of Cedar Park Concrete Construction Corp. ("Cedar Park").

At trial the government witness Costigan testified that Bruno asked him to make "complementary bids" on several jobs.[3] Costigan further testified that he

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[1] Defendants argue that they are entitled to offer the witnesses' grand jury testimony as affirmative evidence of defendants' innocence of the charges in the indictment.

[2] Rule 804(b)(1) of the Federal Rules of Evidence permits the admission of prior testimony where the declarant is unavailable. The Rule states:

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.
>
> (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

[3] A complementary bid is one made with no expectation of success but is a part of a bid rigging scheme.

had been told by an unindicted co-conspirator that Cedar Park was a member of a "Club" which exacted a two percent tribute for all concrete contracts awarded over a certain amount. The unindicted co-conspirator stated that when Cedar Park was awarded such a contract and failed to pay the two percent, it was forced out of business.

The government witness Sternchos testified that he was told by the same unindicted co-conspirator that Vincent DiNapoli represented the interests of Cedar Park at the "Club". The government introduced Exhibit 429 allegedly written by Louis DiNapoli which had the notation: "Cedar Park V & T 10%" which the government claims shows Vincent DiNapoli's hidden interest in Cedar Park.

Because of the *Brady* letter sent to defendants by the government after the grand jury testimony of Bruno and DiMatteis, the defendants argue that the grand jury testimony of these witnesses contain exculpatory material which is admissible under Fed.R. Ev. 804(b)(1).

The Court of Appeals for this Circuit has never ruled on the use of grand jury testimony under 804(b)(1) by the defense. Judge Owen of this Court, in an unpublished opinion in *United States v. Salerno* ("*Salerno I*" or "The Commission Case"), SSS 85 Cr. 139 (April 10, 1987), rejected the identical defense claim.[4]

[4] Judge Owen ruled that the issue was not properly presented because the defendants had not established that the witnesses were "unavailable" since they had not been presented at trial to assert their Fifth Amendment privilege. Nevertheless, Judge Owen observed:

> Further, even assuming, therefore, that grand jury testimony is *ever* admissible under Rule 804(b)(1), its

The defendants argue that then District Court Judge George C. Pratt in *United States v. Maritas*, 81 Cr. 122, E.D.N.Y. followed the procedure now urged upon this Court for admission of grand jury testimony. Examination of the minutes in *Maritas* does not support this claim. The trial record does not disclose that Judge Pratt directed the prosecution to furnish defendants with grand jury testimony and ordered use of such testimony at trial. The result reached in *Maritas* was pursuant to agreement between the prosecution and defense. We have no such agreement in the instant case.

DISCUSSION

The issue squarely presented to this Court is whether a defendant may introduce into evidence at trial immunized grand jury testimony, after the grand jury witness has asserted his Fifth Amendment privilege[5] and the government refuses to im-

> receipt must be preconditioned on a careful assessment under Rule 804(b)(1), of the realistic opportunity and motive which the government had to cross-examine. That assessment is mandated not only by Rule 804(b)(1), but by the need to avoid chilling Grand Jury witnesses in order to gain a proper opportunity to cross-examine. *See United States v. Shandell*, 800 F.2d 322, 324 (2d Cir. 1986) (no need to grant defense immunity to grand jury witness who is target of prosecution).
>
> In this case, for the reasons set forth in the Government's separately submitted affidavit, there was neither motive nor opportunity to cross-examine Bruno in the Grand Jury. That testimony was accordingly inadmissible under Rule 804(b)(1).

[5] This case is to be distinguished from one in which the witness is not called to assert the privilege, *i.e.*, *United States v. Wright*, 558 F.2d 31 (2nd Cir. 1978), or in which the at-

munize the witness for purposes of trial.[6] We are, in other words, asked to decide whether such grand jury testimony is within the purview of Rule 804(d)(1).

Even though there is scant law on the subject, 804(b)(1) in the grand jury testimony context must be read with the gloss of history.

We start first with the government's obligation under *Brady* v. *Maryland*, to advise a defendant of any evidence in its possession which may be deemed exculpatory. After Bruno and DiMatteis testified under a grant of immunity before the grand jury, the government advised defense counsel that the witnesses had testified to matters favorable to the accused in this case. This advice alerted the accused that Bruno and DeMatteis allegedly had exculpatory evidence. That is all that is required under *Brady*. The Court of Appeals in *United States v. Turkish*, 623 F.2d at 775 reasoned that *Brady* has not been extended to create a governmental obligation to assist the defense in extracting from others evidence shielded by a valid assertion of privilege. The Court further held that although the Fifth Amendment privilege may be displaced, at the prosecution's dis-

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torney for the witness stated that if witnesses were called he would assert the Fifth Amendment. *Salerno I*, SSS 85 Cr. 139 (April 10, 1987).

[6] The law of this Circuit is that failure to grant immunity to a defense witness does not violate the Sixth Amendment (Compulsory Process Clause) nor the Fifth Amendment (either under a claim of equalizing the powers of prosecution and defense or pursuit of truth), *United States v. Turkish*, 623 F.2d 769, 773-777 (2d Cir. 1980). But *see*, *United States v. DePalma*, 476 F.Supp. 775 (S.D.N.Y. 1979) decided a year before *Turkish*.

cretion, by a grant of immunity, the decision to grant immunity is an executive not a judicial function.

Recognizing that *Turkish* prevents any argument based on a defendant's right of access to exculpatory testimony shielded by valid privilege, the next arrow in the defense bow is 804(b)(1).

There is a certain tension between a literal reading of 804(b)(1) in the context of grand jury testimony, and Fed.R.Crim. P. 6(e)(3)(C)(i). The later rule authorizes disclosure of grand jury testimony "when so directed by a court preliminarily to or in connection with a judicial proceeding . . . ." When Rule 6 is applicable, a court's decision to disclose grand jury testimony should be based upon a particularized need *which outweighs the possible effect of disclosure upon the functioning of future grand juries. In re Grocery Products Grand Jury Proceedings of 1983*, 637 F. Supp. 1171 (D. Conn. 1986).

A literal application of 804(b)(1) to the facts in this case, one may argue, would dictate disclosure. The testimony sought was given at a prior hearing in the same proceeding and is sought to be offered against the government which had the opportunity to examine the witness. However, the application of the Rule to the facts in this case is not so simple. The difficulty arises in interpreting the phrases "another hearing" and "similar motive to develop the testimony" used in 804(b)(1).

Courts have had no difficulty in applying the rule to former testimony given at a prior adversary hearing where the party against whom the testimony is offered either cross-examined or had the opportunity to do so. *United States v. Singleton*, 460 F.2d 1148, 1152-53 (2d Cir. 1972). *United States v. Paris*, 551

F.2d 233 (8th Cir. 1977). However when the prior testimony, even if subject to cross-examination, was given at a hearing where the issue to be resolved was different from that of the second hearing, the prior testimony is inadmissible. The Second Circuit has made this point explicit in *United States v. Wingate*, 520 F.2d 309, 315-16 (1975) and implicit in *United States v. Serna*, 799 F.2d 842 (1986).

In *Wingate*, the defendant argued that he should be permitted to introduce the suppression hearing testimony of his co-defendant, Smith,[7] because Smith therein repudiated earlier statements implicating Wingate. Judge Hays, writing for the Court (Judge Mansfield concurring), explained:

> Testimony given at a previous trial or at a pretrial hearing by a presently unavailable witness is inadmissible at a subsequent trial unless the issues in the two proceedings are sufficiently similar to assure that the opposing party had a meaningful opportunity to cross-examine when the testimony was first offered. [citations omitted.] The issue at the suppression hearing in this case was not whether Wingate was guilty or innocent but rather whether Smith's confession was made voluntarily . . . .[8]

Serna dealt with the admissibility of portions of the trial transcript of a co-conspirator, Chupurdy, whose trial preceeded that of Serna and a co-defendant, Cinnate.[9] The defendants in the later trial ar-

[7] Since Wingate could not compel his co-defendant to testify, the co-defendant was "unavailable".

[8] *Wingate*, 520 F.2d at 316.

[9] Another co-conspirator, Castellan, entered into a cooperation agreement and testified for the government at both trials.

gued that the testimony of Chupurdy at his trial, which the defendants claimed was exculpatory [as] to them, should have been admitted under 804(b)(1). The trial Court, although believing that Chupurdy would assert a Fifth Amendment privilege in response to defendants' subpoena, refused to admit the former testimony.

Judge Oakes, writing for the Court, explained:

> Because Castellon's credibility was a key issue in Chupurdy's case, the prosecutor arguably had a motive to cross-examine Chupurdy on his claim that he had not attended a House of Pancakes meeting. However, since cross-examination was unlikely to shake Chupurdy's denial of such a meeting, the prosecutor, wisely, we think, chose to focus his cross-examination on the details of Chupurdy's transportation of the container to show that his claim of ignorance of its contents was unbelievable, rather than to emphasize to the jury Chupurdy's denial of any House of Pancakes meeting. Thus, exclusion of Chupurdy's statements was not an abuse of the trial court's discretion since the prosecutor had no real motive to explore Chupurdy's earlier statements.[10]

The combined teaching of *Wingate* and *Serna* has direct application to the issue before this Court.

Historically the grand jury has been a body of citizens before whom evidence is presented by the prosecuting attorney for the purpose of the jurors reaching a determination whether the evidence constitutes sufficient cause to return an indictment. *Costello v. United States*, 350 U.S. 359, 361 (1956).

[10] *United States v. Serna*, 799 F.2d 849-50.

The motive or purpose of a prosecutor in presenting a witness to the grand jury is to explore evidence of criminal conduct, not of the witness, but of the target of the investigation. If the prosecutor believes the witness has not testified truthfully he has the discretion to decide not to attack the credibility of the witness in the grand jury proceeding but to pursue his remedy under the perjury statutes. *Cf., United States v. Lester*, 749 F.2d 1288, 1300-01 (9th Cir. 1984).

Thus, one of the fundamental reasons for the hearsay exception embodied in 804(b)(1) is not present when grand jury testimony is offered at trial, not to impeach the declarant, but as trustworthy affirmative evidence of the guilt or innocence of the accused. Former testimony, under the hearsay exception, is a substitute for the testimony the unavailable witness would have given at trial. The "opportunity and similar motive to develop the testimony" language of Rule 804(b)(1) "operates to screen out those statements, which although made under oath, were not subject to the scrutiny of a party interested in thoroughly testing its validity." *United States v. Pizarro*, 717 F. 2d 336, 349 (7th Cir. 1983).

When the character or posture of the prior proceeding is different from the subsequent proceeding, and that difference dictates the parameters for development of the prior testimony, the prior testimony is inadmissible in the subsequent proceeding. The fact that the prosecutor, in the grand jury, had the opportunity to then discredit the testimony of the witness and did not choose to do so does not address the rationale of the 804(b)(1) hearsay exception. Cross-examination or the opportunity to cross-examine is not talismanic. The test is rather whether there was

a motive to develop the prior testimony. *McCormick on Evidence*, § 255 at 616 (2d ed. 1972) explains the meaning of the Rule:

> The opportunity [to cross-examine] must have been such as to render the conduct of the cross-examination or the decision not to cross-examine meaningful in the light of the circumstances which prevail when the former testimony is offered. A change of circumstances may be such as to bar compliance with this requirement.

This court finds that the motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial. This difference in motive to examine or cross-examine prevents the introduction of the grand jury testimony of DeMatteis and Bruno under Fed.F.Ev. 804(b)(1).

The defendants argue that under Fed.R.Ev. 806 the government has ample opportunity to offer evidence to discredit the grand jury testimony, and that therefore the trustworthiness of that testimony can be placed before the trial jury. This argument exposes another reason why the testimony should not be admitted in the first place.

In this case, the government has placed under seal materials which seriously undercut the truthfulness of the grand jury testimony and explain why the prosecutor did not pursue the witnesses, by way of cross-examination, in the grand jury.

If the government, at trial, was compelled to discredit the grand jury testimony by using the materials under seal, it would be required to publicly disclose information in possession of the grand jury which the government is prevented from disclosing

under Fed.R.Crim.P. 6. This Court finds therefore that there is no adequate guarantee of reliability of the grand jury testimony to justfy its placement before this jury.

Defendants' motion is in all respects denied.

IT IS SO ORDERED:

Dated: New York, New York
February 1, 1988

/s/ Mary Johnson Lowe
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 88-1464, 88-1470, 88-1471, 88-1472, 88-1473, 88-1474, 88-1477, 88-1547, 90-1291, 90-1292, 90-1296, 90-1297, 90-1301, 90-1311, 90-1312, 90-1351

UNITED STATES OF AMERICA, APPELLEE

-against-

ANTHONY SALERNO, a/k/a "Fat Tony," VINCENT DI NAPOLI, a/k/a "Vinnie," LOUIS DI NAPOLI, a/k/a "Louie," MATTHEW IANNIELLO, a/k/a "Peanuts," MILTON ROCHMAN, a/k/a "Maishe," NICHOLAS AULETTA, a/k/a "Nick," EDWARD J. HALLORAN, a/k/a "Biff," ALVIN O. CHATTIN, a/k/a "Al" RICHARD COSTS, a/k/a "Richie," and ANIELLO MIGLIORE, a/k/a "Neil," DEFENDANTS

MATTHEW IANNIELLO, a/k/a "Matty the Horse," VINCENT DI NAPOLI, a/k/a "Vinnie," LOUIS DI NAPOLI, a/k/a "Louie," NICHOLAS AULETTA, a/k/a "Nick," EDWARD J. HALLORAN, a/k/a "Biff," ANIELLO MIGLIORE, a/k/a "Neil," ANTHONY SALERNO, a/k/a "Fat Tony," and ALVIN O. CHATTIN, a/k/a "Al," DEFENDANTS-APPELLANTS

[Filed Sept. 24, 1991]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellee, United States of America.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of November, one thousand nine hundred and ninety-one.

Docket Nos. 88-1464, 88-1470, 88-1471, 88-1472, 88-1473, 88-1474, 88-1477, 88-1547, 90-1291, 90-1292, 90-1296, 90-1297, 90-1301, 90-1311, 90-1312, 90-1351

UNITED STATES OF AMERICA, APPELLEE,

-against-

ANTHONY SALERNO, a/k/a "FAT TONY," VINCENT DI NAPOLI, a/k/a "VINNIE", LOUIS DI NAPOLI, a/k/a "LOUIE", MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE", JOHN TRONOLONE, a/k/a "PEANUTS", MILTON ROCKMAN, a/k/a "MAISHE", NICHOLAS AULETTA, a/k/a "NICK", EDWARD J. HALLORAN, a/k/a "BIFF", ALVIN O. CHATTIN, a/k/a "AL", RICHARD COSTA, a/k/a "RICHIE", and ANIELLO MIGLIORE, a/k/a "NEIL", DEFENDANTS,

MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE", VINCENT DI NAPOLI, a/k/a "VINNIE", LOUIS DI NAPOLI, a/k/a "LOUIE", NICHOLAS AULETTA, a/k/a "NICK", EDWARD J. HALLORAN, a/k/a "BIFF", ANIELLO MIGLIORE, a/k/a "NEIL", ANTHONY SALERNO, a/k/a "FAT TONY", and ALVIN O. CHATTIN, a/k/a "AL", DEFENDANTS-APPELLANTS.

[Filed Nov. 20, 1991]

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by appellee, United States of America,

The panel that heard the appeal having denied rehearing by order dated September 24, 1991, and upon further consideration having amended its opinion by order dated November 6, 1991, and a poll having been requested and taken subsequent to the entry of the September 24, 1991, order,

IT IS HEREBY ORDERED that the final paragraph of the September 24, 1991, order with respect to the suggestion for rehearing en banc is amended to read:

It is further noted that the suggestion for rehearing en banc having been transmitted to the judges of the court in regular active service and at the request of such a judge, a poll of the judges in regular active service having been taken, a majority has voted not to reconsider the matter en banc. Judge Newman dissents from the denial of en banc reconsideration in an opinion concurred in by Judges Kearse, Mahoney and Walker.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH,
Clerk

JON O. NEWMAN, *Circuit Judge* (with whom Kearse, Mahoney, and Walker, *Circuit Judges*, join), dissenting from denial of rehearing in banc:

The panel opinion reverses the outcome of a 13-month criminal trial because of an evidentiary ruling that was consistent with the prior law of this Circuit and with the law of all the other circuits to have considered the issue. The panel holds that in the circumstances of this case two defense witnesses who invoked their privilege against self-incrimination are not "unavailable" to the Government for purposes of the hearsay exception of Rule 804(b)(1) of the Federal Rules of Evidence because the prosecutor had the option of conferring use immunity. As a result of that unprecedented holding, the panel concludes that the District Court erred in excluding under Rule 804(b)(1) the defendants' offer of prior grand jury testimony of the two witnesses. *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991).

The two witnesses had testified at the grand jury under a grant of use immunity and had given testimony favorable to the defendants, testimony that the Government believes was false. The defendants offered the witnesses' grand jury testimony at trial. The District Judge excluded the testimony, deeming it hearsay. She ruled that though the witnesses were "unavailable" to the defendants by virtue of invoking their self-incrimination privilege, their statements did not qualify as hearsay exceptions under Rule 804(b)(1) because the Government did not have a "similar motive" to cross-examine at trial as it had at the grand jury. The panel agrees with the District Judge that a witness who refuses to testify on grounds of self-incrimination is normally "unavailable," *id.* at 805, and that the Government lacked a similar motive

to cross-examine at trial as it had at the grand jury, *id.* at 806. Nevertheless, the panel rules that the Government cannot rely on the lack of similar motive because the witnesses were not "unavailable" *to the Government*, since it could have conferred use immunity at trial.

This Court has previously upheld a trial judge's exclusion under Rule 804(b)(1) of the prior statement of a witness who invokes the self-incrimination privilege at trial. *See United States v. Serna*, 799 F.2d 842 (2d Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987). In *Serna* we ruled that the Government's motive to cross-examine the prior statement, which was testimony at the witness's own trial, differed from the motive to cross-examine at the subsequent trial of the witness's co-defendants. Yet *Serna* did not prohibit the Government from relying on this difference in motive. On the contrary, though the Government could have conferred use immunity in *Serna*, the witness was deemed unavailable, the Government was upheld in its claim of lack of similar motive to cross-examine, and the exclusion of the statement was upheld. The law in other circuits agrees with *Serna*. *See, e.g., United States v. Powell*, 894 F.2d 895, 901 (7th Cir.), *cert. denied*, 110 S. Ct. 2189 (1990); *United States v. Lowell*, 649 F.2d 950, 965 (3d Cir. 1981).

Putting the Government to the unattractive choice of suffering the admission into evidence of uncross-examined hearsay that it believes is false or else obtaining the opportunity to cross-examine by conferring use immunity not only ignores the settled law in this Circuit and elsewhere on prior statements of witnesses who invoke the privilege against self-incrimination, but also undermines our consistent

rulings refusing to impose on the Government an obligation to confer use imunity on defense witnesses. *See United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); *United States v. Turkish*, 623 F.2d 769, 772-74 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

The panel's ruling also creates serious problems for the Government in the development of evidence at the grand jury. If the Government calls to the grand jury witnesses other than those who are certain to give testimony helpful to the prosecution (and the Government will frequently prefer to call witnesses of this sort, both to investigate undeveloped matters and to freeze a hostile or wavering witness's testimony), it must then accept admission of their hearsay at trial if offered by the defense, or severely limit its opportunity to prosecute them by conferring use immunity. *See United States v. North*, 910 F.2d 843, 853-73 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991). It is no answer to say that the prosecutor may cross-examine the witness in the grand jury. At a preliminary stage of an investigation, the prosecutor might be unaware that the testimony is false. Even if he disbelieves the witness, the prosecutor might lack the basis for effective cross-examination or might jeopardize an ongoing investigation by cross-examination that reveals the existence and identity of confidential sources.

The Government apprehends that the panel's opinion will apply to disable it from claiming a witness's unavailability in other contexts, such as where the Government offers a statement claimed to be against interest under Rule 804(b)(3), *see United States v. Williams*, 927 F.2d 95, 98-99 (2d Cir.), *cert. denied*, —— S. Ct. —— (1991); *United States v. Lang*, 589 F.2d 92, 95-97 (2d Cir. 1978) (use immunity need

not be given to witness "unavailable" for purposes of Rule 804(b)(3)), or where a missing witness charge is objected to on the ground that the witness is equally unavailable to both sides, *United States v. Simmons*, 663 F.2d 107 (D.C. Cir. 1979). The panel has usefully amended its original opinion to make explicit that it is not considering whether its novel ruling on witness unavailability applies beyond the context of Rule 804(b)(1). *United States v. Salerno*, No. 88-1464 (2d Cir. Nov. 6, 1991). But the Government is entitled to be apprehensive that a ruling that a witness is "available" to the prosecution because use immunity can be conferred might in the future be applied to determine "availability" beyond Rule 804(b)(1).

Before this Circuit embarks on a new course that relates witness availability to the Government's opportunity to confer use immunity, a course fraught with serious implications for the conduct of grand jury investigations, the matter should receive the careful consideration of the in banc court. I regret that a majority of my colleagues do not consider this ruling to merit rehearing in banc. If the Supreme Court permits the panel's ruling to stand, one may at least hope that the ruling will be limited not merely to Rule 804(b)(1) statements but to the precise circumstances of this case—namely, a Rule 804(b)(1) statement of a witness on whom the Government has previously conferred use immunity at the grand jury. Because I cannot be confident that the panel intends its ruling to be thus limited, and because the ruling departs without justification from the law of this Circuit and creates a needless intercircuit conflict, I respectfully dissent from the decision not to rehear this case in banc.

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